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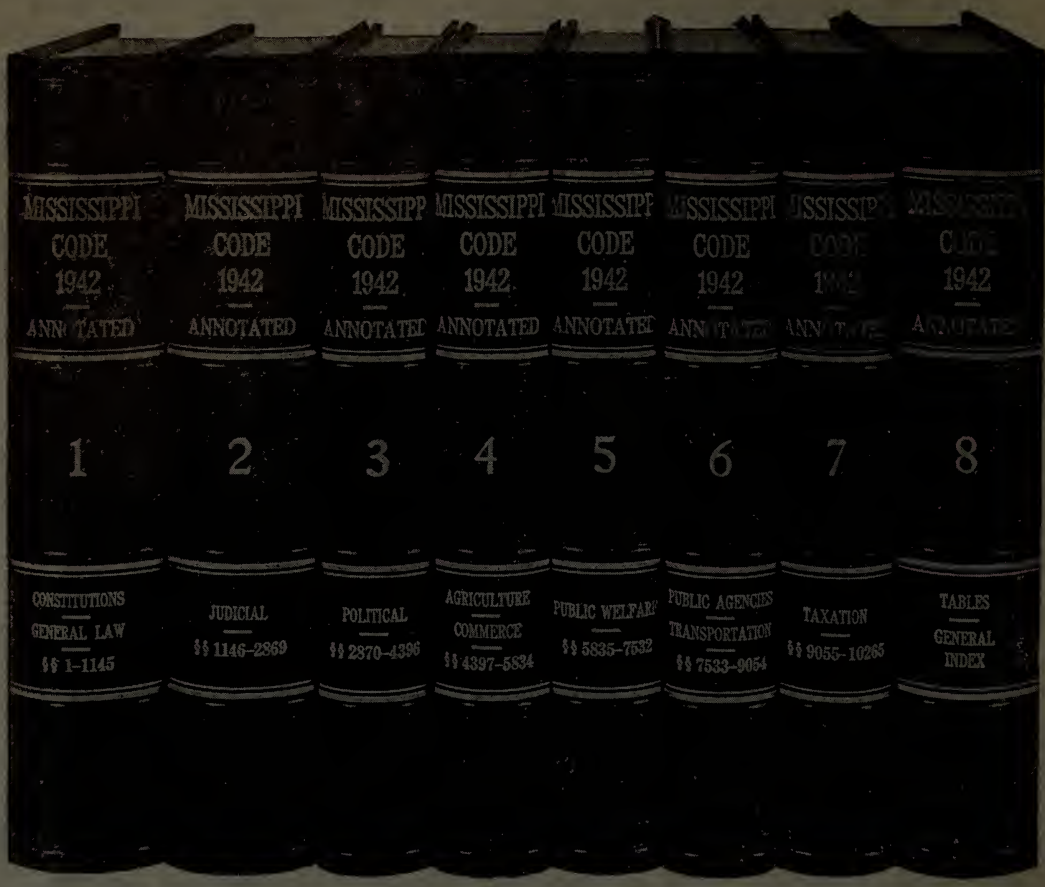

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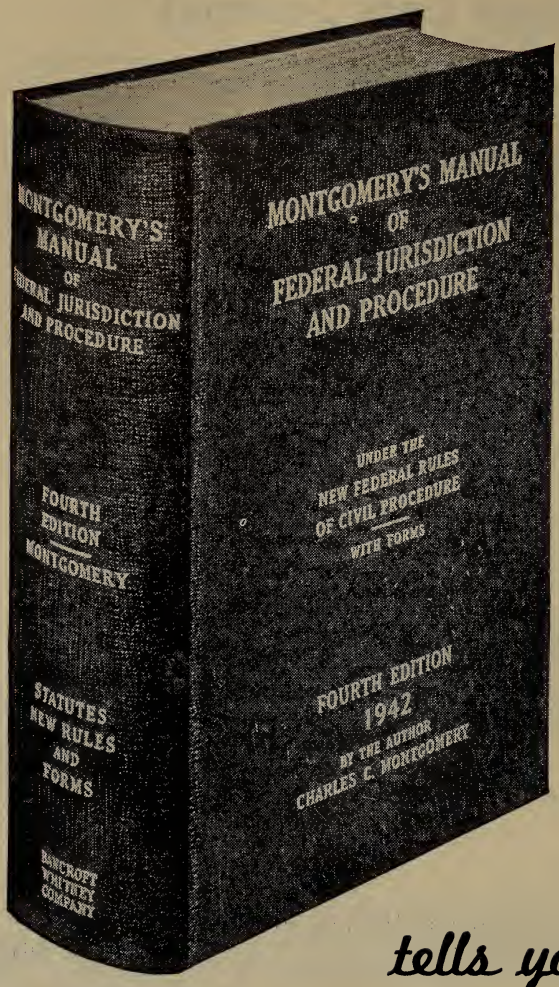

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PROTECTION OF THE ACCUSED'S RIGHTS IN COURTS-MARTIAL

*Walter P. Armstrong, Jr.**

It is often said that a member of the armed forces becomes subject to a discipline which admits no error, and that, if he believes he has been wronged, he has no redress. This is far from true. Military discipline is rigid but it is not infallible. And recognizing this, the Articles of War have provided means for the soldier to justify his actions, even though they may be contrary to military discipline. The army is based upon the theory that the superior officer is usually right, but it is not so blind as to hold that this is invariably the case. The last article of war[1] provides that a soldier who believes that he has been wronged and upon application to his commanding officer is refused redress may complain to the commanding general in the locality where the wrong occurred. If the general finds that his complaint is well taken, he will immediately take steps to redress the wrong, and transmit to the Department of War a true statement of the facts in the case.

But it is seldom that a soldier will go to such lengths. Ordinarily the wrong consists in a wrongful punishment. Commanding officers have the authority to impose punishment within certain limits without trial;[2] but at the same it is recognized that their judgment may sometimes be in error. And so, by the same article of war by which they are given this authority, it is also provided that the soldier may, if he wishes, demand a court-martial to determine the case; or, if he feels that the punishment is unjust or disproportionate to the crime, he may appeal to the next higher authority, who has the power to remit it. However, during the period while this appeal is pending he must undergo the punishment as originally imposed.

The more serious cases of right or wrong which come under military jurisdiction are determined by courts-martial. And here again the rights of the accused are jealously guarded, even more so, perhaps, than in civil courts.

Great care is taken that the courts shall be impartial. The available officers who are best qualified by reason of age, training, experience, and

*Captain, Adjutant General's Department, now on overseas duty.

[1] 41 Stat. 811 (1920), 10 U. S. C. A. § 1593 (Art. of War 121).

[2] 41 Stat. 808 (1920), 10 U. S. C. A. § 1576 (Art. of War 104).

judicial temperament are preferred, and if possible no officer of less than two years' service shall be a member.[3] No court shall be appointed by an officer who appears as the accuser or prosecutor in the case, but must be appointed by a superior authority; and no officer shall be eligible to sit if he is the accuser or a witness for the prosecution.[4] No officer who has served in any capacity at the original trial shall subsequently act upon review of the case.[5] No officer, if it can be avoided, shall be tried by those inferior to him in rank.[6] The accused shall have the right to challenge any member of the court for cause, and shall also have the right to one peremptory challenge.[7] Voting by the court upon the findings or sentence shall be by secret written ballot, and when an oral vote is taken upon interlocutory questions, it shall be by rank beginning with the junior officer.[8] The Trial Judge Advocate and his assistants are excluded from closed sessions of the court; and when their assistance is required, it shall be obtained in open court, and in the presence of the accused and his counsel.[9] If the accused is acquitted, this decision must be announced at once in open court.[10]

Defense counsel is appointed for each case,[11] but the accused is entitled to individual counsel of his own choice, either civilian or military.[12]

The articles provide that,

> "He will guard the interests of the accused by all honorable and legitimate means known to the law. It is his duty to undertake the defense regardless of his personal opinion as to the guilt of the accused; to disclose to the accused any interest he may have in or in connection with the case which might influence the accused in the selection of counsel; to represent the accused with undivided fidelity, and not to divulge his secrets or confidence."[13]

He will explain the accused's rights to him, before the trial, although the court may make a further explanation if there is any doubt as to his understanding.[14] The accused will be seated near his counsel at the trial.[15] The accused must be present at all proceedings in open court, except during revision;[16] but the escape of the accused during the trial does not terminate the court's jurisdiction.[17]

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[3] 41 STAT. 788 (1920), 10 U. S. C. A. § 1476 (Art. of War 4).
[4] 41 STAT. 788 (1920), 10 U. S. C. A. §§ 1479, 1480 (Arts. of War 8, 9).
[5] 41 STAT. 789 (1920), 10 U. S. C. A. § 1482 (Art. of War 11).
[6] 41 STAT. 790 (1920), 10 U. S. C. A. § 1487 (Art. of War 16).
[7] 41 STAT. 790 (1920), 10 U. S. C. A. § 1489 (Art. of War 18).
[8] 41 STAT. 793 (1920), 10 U. S. C. A. § 1502 (Art. of War 31).
[9] 41 STAT. 793 (1920), 10 U. S. C. A. § 1502 (Art. of War 30).
[10] 41 STAT. 792 (1920), 10 U. S. C. A. § 1500 (Art. of War 29).
[11] 41 STAT. 789 (1920), 10 U. S. C. A. § 1482 (Art. of War 11).
[12] 41 STAT. 790 (1920), 10 U. S. C. A. § 1488 (Art. of War 17).
[13] A MANUAL FOR COURTS-MARTIAL (1928) ¶ 45b.
[14] *Id.* ¶ 75a.
[15] *Id.* ¶ 54.
[16] *Id.* ¶ 55.
[17] *Id.* ¶ 10.

No case will be referred to a general court-martial for trial until after a thorough and impartial investigation shall have been made.[18] At the investigation full opportunity must be given to the accused to cross-examine witnesses against him and to present anything he may desire in his own behalf, either in defense or mitigation, and the investigating officer shall examine available witnesses requested by the accused. Before a case is referred to a general court-martial, the charges will be reviewed by the staff judge advocate to determine their legal sufficiency. If the accused is being held in confinement, immediate steps will be taken to bring the case to trial or to release him. In the case of a general court-martial the charges must be forwarded within eight days, or the reason for the delay reported to superior authority. A copy of the charges must be served upon the accused, and failure to do so is grounds for continuance.

In time of peace no person shall be brought to trial sooner than five days after the service of charges upon him, in order to allow him adequate time in which to prepare a defense. Any officer responsible for delay in bringing a case to trial is himself subject to court-martial.

All crimes except mutiny, murder, or desertion in time of war are subject to a two-year statute of limitations.[19] No person can without his consent be tried twice for the same offense; nor can a court reconsider an acquittal, a finding of not guilty upon any count, or any sentence with a view to increasing its severity.[20]

The accused may avail himself of special pleas, such as pleas to the jursidiction, pleas in abatement, or pleas in bar.[21] The court may reconsider its ruling upon a special plea so long as the case remains before it. If during the course of the trial facts appear which could form a basis for a special plea, the court may allow the accused to enter such a plea at that time.

The accused may also enter a general plea of guilty or not guilty. He has a legal and moral right to plead not guilty even if he knows that he is guilty.[22] In such case his plea simply places upon the prosecution the burden of proving his guilt. If the accused pleads guilty before a summary court, the meaning and effect of such a plea will be explained to him.[23] If he fails or refuses to plead, or if after a plea of guilty makes a statement inconsistent with such a plea, or if it appears that he entered a plea of guilty through lack of understanding, the court will proceed with

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[18]This provision and those following in the paragraph are contained in Article of War 70. Formerly they applied to all courts-martial. 41 STAT. 802 (1920), 10 U. S. C. A. § 1542 (Art. of War 70). But in 1937 they were limited to general courts-martial only. 50 STAT. 742 (1937), 10 U. S. C. A. § 1542 as amended (Art. of War 70).

[19]41 STAT. 794 (1920), 10 U. S. C. A. § 1510 (Art. of War 39).

[20]41 STAT. 795 (1920), 10 U. S. C. A. § 1511 (Art. of War 40).

[21]A MANUAL FOR COURTS-MARTIAL (1928) ¶ 64a.

[22]*Ibid.*

[23]*Id.* ¶ 82.

the case as if under a plea of not guilty.[24] In any event, evidence will be introduced under a plea of guilty in order to establish any extenuating circumstances.[25] The court may allow the accused to change his plea at any time.[26]

The trial judge advocate has the power to issue process to compel the attendance of witnesses.[27] This power also extends to witnesses for the defense, and the trial judge is required to secure the attendance of all witnesses requested by the accused, unless it appears that their testimony would be unnecessary or immaterial, or that a deposition would serve.[28] Witnesses are protected from self-incrimination or degradation.[29] Depositions may not be used by the prosecution in capital cases, but may be used by the defense.[30]

The accused may appear as a witness in his own defense, but cannot be compelled to do so.[31] He may also make an unsworn statement which will be considered by the court in reaching its decision, but will not be given the full weight of evidence.[32] If he elects to remain silent, no comment may be made upon or conclusions drawn from his silence.[33] Once he has taken the stand, he may be recalled at any time.[34] All of these rights must be explained to him by his counsel before the trial,[35] and may also be explained to him by the court during the trial, if there is any doubt as to his understanding.[36]

Records of courts of inquiry are admissible as evidence for the prosecution only with the consent of the accused, and are entirely inadmissible in capital cases or cases involving the dismissal of an officer, but they may be introduced by the defense in all cases.[37] In general the rules of evidence in courts-martial are governed by those in effect in federal district courts,[38] and all of the safeguards applied there are in effect in military courts.

Cruel and unusual punishments by courts-martial are prohibited.[39] The maximum punishments which may be imposed by specific courts are limited,[40] as are the maximum punishments which may be imposed for

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[24] 41 STAT. 791 (1920), 10 U. S. C. A. § 1492 (Art. of War 21).
[25] A MANUAL FOR COURTS-MARTIAL (1928) ¶ 70.
[26] *Id.* ¶ ¶ 70, 76.
[27] 41 STAT. 791 (1920), 10 U. S. C. A. § 1493 (Art. of War 22).
[28] A MANUAL FOR COURTS-MARTIAL (1928) ¶ 97a.
[29] 41 STAT. 792 (1920), 10 U. S. C. A. § 1495 (Art. of War 24).
[30] 41 STAT. 792 (1920), 10 U. S. C. A. § 1496 (Art. of War 25).
[31] A MANUAL FOR COURTS-MARTIAL (1928) ¶ 120d.
[32] *Id.* ¶ 76.
[33] *Id.* ¶ 77.
[34] *Id.* ¶ 121a.
[35] *Id.* ¶ 45b.
[36] *Id.* ¶ 75a.
[37] 41 STAT. 792 (1920), 10 U. S. C. A. § 1498 (Art. of War 27).
[38] 41 STAT. 794 (1920), 10 U. S. C. A. § 1509 (Art. of War 38).
[39] 41 STAT. 795 (1920), 10 U. S. C. A. § 1512 (Art. of War 41).
[40] 41 STAT. 789 (1920), 10 U. S. C. A. §§ 1484, 1485 (Arts. of War 13, 14).

specific offenses.[41] However, a case which would ordinarily be tried by a general court-martial may in the discretion of the appointing authority be referred to a special court-martial, in which case the limitation upon the punitive power of the court remains in effect.[42] Sentences of less than ten years require a two-thirds vote of the court; those of over ten years, three-quarters; and the death penalty can be imposed only by unanimous concurrence of all the members.[43] Confinement in a penitentiary can be imposed only in cases involving mutiny, desertion in time of war, repeated desertion in time of peace, commutation of death sentences, or in cases in which the offense is recognized by some United States statute as one punishable by penitentiary confinement of more than one year and a sentence of more than one year is adjudged by the court.[44] Persons charged with minor offenses will not ordinarily be placed in confinement pending trial, but only in arrest.[45]

Errors in pleading, procedure, or the admissibility of evidence are not grounds for reversal unless it appears that they adversely affected the substantial rights of the accused.[46] Every person tried by a general court-martial is entitled to a copy of the record upon request.[47] No sentence of a court-martial may be carried into effect until it has been approved by the authority appointing the court.[48] Incident to this power to approve is the power to reduce the degree of the offense, to disapprove all or part of the sentence, or to remand the case for rehearing.[49] The reviewing authority may also remit or mitigate all or any part of the sentence,[50] or may suspend it.[51] In general courts-martial the record must also be referred to the staff judge advocate for review.[52]

Certain sentences involving general officers, the dismissal of any officer or cadet, or the death penalty require confirmation by the president of the United States before execution.[53] In time of war, this confirmation may be obtained in some cases from the commanding general of an army in the field. The powers incident to this power to confirm are the same as those involved in the power to approve cited above.[54] When confirmation is required, approval is unnecessary. Such sentences may be suspended by the appointing authority pending confirmation.[55]

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[41] A MANUAL FOR COURTS-MARTIAL (1928) ¶ 104c, as per 41 STAT. 796 (1920), 10 U. S. C. A. § 1516 (Art. of War 45).
[42] 41 STAT. 789 (1920), 10 U. S. C. A. § 1483 (Art. of War 12).
[43] 41 STAT. 795 (1920), 10 U. S. C. A. § 1514 (Art. of War 43).
[44] 41 STAT. 795 (1920), 10 U. S. C. A. § 1513 (Art. of War 42).
[45] 41 STAT. 802 (1920), 10 U. S. C. A. § 1541 (Art. of War 69).
[46] 41 STAT. 794 (1920), 10 U. S. C. A. § 1508 (Art. of War 37).
[47] 41 STAT. 809 (1920), 10 U. S. C. A. § 1583 (Art. of War 111).
[48] 41 STAT. 796 (1920), 10 U. S. C. A. § 1517 (Art. of War 46).
[49] 41 STAT. 796 (1920), 10 U. S. C. A. § 1518 (Art. of War 47).
[50] 41 STAT. 797 (1920), 10 U. S. C. A. § 1521 (Art. of War 50).
[51] 41 STAT. 799 (1920), 10 U. S. C. A. § 1524 (Art. of War 52).
[52] 41 STAT. 796 (1920), 10 U. S. C. A. § 1517 (Art. of War 46).
[53] 41 STAT. 796 (1920), 10 U. S. C. A. § 1519 (Art. of War 48).
[54] 41 STAT. 797 (1920), 10 U. S. C. A. § 1520 (Art. of War 49).
[55] 41 STAT. 799 (1920), 10 U. S. C. A. § 1523 (Art. of War 51).

The Judge Advocate General is empowered to establish in his office a board of not less than three officers of his department for the purpose of reviewing certain cases and, if necessary, ordering rehearings.[56] In cases requiring the confirmation of the president, the record first goes to this board, which adds its recommendation and forwards it to the Judge Advocate General, who in turn gives it to the Secretary of War for delivery to the President. If this board determines that the record is legally insufficient to support the findings or sentence, or contains errors prejudicial to the accused, it may order a rehearing. Any reviewing authority may order a rehearing for the same reasons. Certain limitations are placed upon the court which rehears the case. No member of it may have been a member of the original court. The accused may not be found guilty of any offense of which he was found not guilty by the original court, nor may the original sentence be increased unless the increase is based upon a finding of guilty of an offense not considered on the merits at the first trial. Every other record of a trial by a general court-martial must be forwarded to the office of the Judge Advocate General for review, and if it is found to be legally insufficient or to contain prejudicial error, it must be referred to the board described above. If this board determines that the record is imperfect, it returns the record to the Judge Advocate General along with its recommendation. He then transmits the record through the Secretary of War to the President, who may confirm, mitigate, commute, remit or vacate any part of the sentence or approve, disapprove, or vacate any findings of guilty in whole or in part. In the field, branch offices of the Judge Advocate General can be set up to handle this work of review; and confirmation may be by the commanding general of the army.

All of the punitive articles of war are required to be read to each soldier within six days after his induction and once each six months thereafter.[57]

These are the precautions which the Army takes to see that any soldier who appears before a court martial receives a fair and impartial trial. It is true that many of the technicalities by means of which the guilty evade justice are eliminated, but none of the essential means by which the accused's rights are protected have been omitted. And there are many guarantees of safety which are not available in civilian courts. On the whole, an innocent man who is unjustly accused will fare better before a military court than he would before any other tribunal.

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[56]Information in this paragraph is contained in 56 STAT. 732 (1942), 10 U. S. C. A. § 1522 as amended (Art. of War 50½).

[57]41 STAT. 809 (1920), 10 U. S. C. A. § 1582 (Art. of War 110).

PRIVILEGED COMMUNICATIONS STATUTE— SWORD AND SHIELD

*Hubert S. Lipscomb**

The subject of this article is a highly controversial one. The right of the many learned and eminent members of bench and bar in Mississippi, who hold opinions at variance with those expressed herein, to entertain such opinions is highly respected. The recommendation of the Study Committee of the Mississippi State Bar that the current session of the Legislature modify the subject statute may render a review of it timely.

The constitutions and legislatures of all the states set up courts whose function was to ferret out the truth in litigated controversies in order that justice might be achieved by the operation of the law upon the facts. The legislatures of many of these same states have been occupied for over a century in promulgating rules of evidence which ham-string these courts in performing that very function. In cases involving the health or physical condition of a litigant they have sealed the lips of the physician in the very place, the court room, where justice cries out for the facts.

In 1828, New York enacted a statute providing that, unless the patient consents, the doctor may not "disclose any information which he acquired in attending a patient in a professional capacity and which was necessary to enable him to act in that capacity."[1] This was an innovation in the law in that at English common law there was no such check upon the testimony of the doctor. Other states followed suit, until now there are only seventeen[2] states which have no such statutes and a doctor, like any other witness, is required to disclose all that he knows that is germane to the issue on trial.

The statutes of the remaining thirty-one states differ in many particulars, some of them making exceptions for special medical situations, such as abortion, and information communicated to a physician in an effort unlawfully to procure a narcotic drug. This discussion will be confined, however, to the following statute,[3] enacted by the Legislature in 1906:

> "All communications made to a physician or surgeon by a patient under his charge or one keeping professional advice, are hereby declared to be privileged, and such physician or surgeon shall not be required to disclose the same in any legal proceeding, except at the instance of the patient."

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*Member Miss. State Bar and American Bar Ass'n.; Jackson, Miss.

[1]N. Y. Civil Practice Act (1920) §§ 353, 354, as subsequently amended. See 3 Gilbert-Bliss, Civil Practice of New York Annotated (1926) 352, 354; and (1941) Cumulative Supp. to same.

[2]Alabama, Connecticut, Delaware, Florida, Georgia, Illinois, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, Rhode Island, South Carolina, Tennessee, Texas, Vermont, and Virginia.

[3]Miss. Code Ann. (1930) § 1536.

Everywhere physicians and surgeons are required by the ethics of their profession to preserve the secrets of their patients. No state, however, has made disclosure of confidence by them a crime. The prohibition against such disclosure has no legal protection beyond the four walls of the court room where the truth is sorely needed. For example, a physician can, in a gossip session in the locker room at the Country Club, tell all present that John Doe, a married man, has contracted some loathsome disease. John Doe has no remedy. There is no statute making such disclosure a crime and if John Doe sues the physician for slander the truth is a complete defense. But if John Doe sues for personal injuries sustained in an automobile accident this is something else. He cannot seal the lips of his physician in the club room but he can in the court room.

Of the reasons usually advanced for permitting a litigant to seal the lips of the physician who has examined or treated him, there is but one that has any pretense of validity: It is said that if the patient knows that his confidences may be divulged in future litigation he will hesitate in many cases to get medical aid that is sorely needed. Communications made by a client to his attorney are privileged, but in nearly every instance the client consults the attorney with litigation, or potential litigation, in mind. Cases in which the patient consults a physician with litigation in mind constitute a very small percentage of the total of consultations by patients with physicians. One may conceive of a relatively small number of cases involving disgraceful or peculiarly private matters where persons might hesitate to consult a physician if the physician could be required to divulge the confidences in the court room.

The question naturally arises, however, whether the advantages of affording persons so situated protection against disclosure can possibly outweigh the paramount public good to be served by the development of the whole truth in litigated cases. As stated, the case in which a person needing medical aid would forego it because of his fear that the doctor could be required to make disclosure in some litigated case is very rare. There is nothing disgraceful or scandalous about a man's contracting tuberculosis or diabetes, the basis of his suit against an insurance company for disability benefits, or breaking a leg in an automobile accident. A person suffering any of these maladies would hardly forego medical aid because the doctor might be compelled to disclose his confidences for the simple reason that the value of medical aid far outweighs the value of a doctor's silence. It is not recorded that in the seventeen states which have no such statute that doctors are starving or that grass is growing in the driveways to the hospitals.

A good lady will sit at her bridge club or sewing circle and regale her friends to the point of boredom with the most intimate details of her operations or physical maladies. If this same lady happens to be the plaintiff in a suit against an insurance company for disability benefits or a suit in tort for personal injuries she invokes the privilege, upon the ground

that it would humiliate or embarrass her to have her privacy invaded in the court room. A plaintiff in a personal injury case may visit ten doctors. Nine of them may advise him that they can find no trace of any injuries. The tenth may advise him that he is suffering with serious injuries. He may put the tenth on the witness stand to make full disclosure concerning the injuries with which he found the plaintiff suffering and seal the lips of the other nine so as to prevent their testifying that they found no injuries. Thus, the statute is both a sword and a shield.

During the early history of this statute the Supreme Court went the limit in construing it liberally in favor of the person invoking it. It held that the word "communications" as used in the statute included matters ascertained by a railroad surgeon from the examination of a person injured in a wreck, it not being necessary that the communications be by word in order to make them privileged.[4] In another case[5] the issue was whether or not the death of the decedent was caused or contributed to by injuries inflicted by appellee's train. The defendant offered the decedent's attending physician who testified, over the plaintiff's objection, that the decedent's death was not caused or hastened by the injuries inflicted by the railroad, but that he died from pellagra. The plaintiff offered in rebuttal another of the decedent's physicians who testified that the injuries did cause or hasten death. The Court held that in so doing the plaintiff did not waive the privilege, and the error in admitting the testimony of the doctor offered by the defendant was not thereby cured. The sole issue in the case was whether or not the injuries inflicted by the railroad had caused or contributed to the death of the decedent. In that particular case the Court left open the question whether or not the plaintiff would have waived the privilege by putting the doctor offered by her on the stand in making out her case in chief.

In later cases,[6] the Court held that the patient does not waive the privilege because he introduces another physician who testifies for the patient about the same facts. In the *Elzey* case the examination was made jointly by the physicians introduced by the plaintiff and those offered by the defendant to whose testimony an objection was sustained.

In *McCaw v. Turner,* et al.,[7] the Court held in effect that the right to waive the privilege belongs to the patient alone, and, following his death no one can waive it. In the course of its opinion the Court said:

> "The manifest reason and obvious purpose of the statute is to enable a patient to disclose his infirmities to his physician in

[4]Yazoo & M. V. R. R. v. Messina, 109 Miss. 143, 67 So. 963 (1915); *rev.* 240 U. S. 395, 36 Sup. Ct. 368, 60 L. ed. 709 (1916).

[5]Hamel v. Southern Ry. in Miss., 113 Miss. 344, 74 So. 276 (1917).

[6]Davis, Director General of Railroads v. Elzey, 126 Miss., 789, 88 So. 630 (1921); *sug. error aff'd.,* 126 Miss. 789, 89 So. 666 (1921); United States Fid. & Guar. Co. v. Hood, 124 Miss. 548, 87 So. 115 (1920); Newton Oil Mill v. Spencer, 116 Miss. 568, 77 So. 605 (1917).

[7]126 Miss. 260, 88 So. 705 (1921).

> order that the physician may prescribe for his disease without fear that his feelings will be shocked or his reputation tarnished by their disclosure by the physician without his consent, which purpose will not only not be sacrificed by giving the words of the statute their usual and ordinary meaning, but, on the contrary, will be sacrificed unless its words are given that meaning. The statute does not limit the privilege to the life of the patient, neither does it confer upon his heirs or devisees who may quarrel over his property the right to tarnish his reputation by causing his physician to disclose his infirmities."[8]

Some freak results have followed the construction placed on the statute in the *McCaw* case. A widow brought suit for the death of her husband who worked in a caisson on the bottom of a river. He died of caisson disease, colloquially known as the "bends." The negligence charged against his employer was that the pressure was reduced too rapidly in the decompression chamber. Since such is the cause of the "bends," it was necessary for the widow to prove that her husband did die of this disease. For this purpose she offered the physician who attended the deceased during the last hours of his life. The defendant invoked the privileged communications statute as construed in the *McCaw* case, and the trial judge was compelled to sustain the defendant's objection. Since the widow could not make out her case by lay testimony, the Court was compelled to direct a verdict in favor of the defendant. Thus, the statute that is ordinarily the plaintiff's sword became the defendant's shield. The case mentioned was not appealed.

Another case not appealed was one wherein the plaintiffs' intestate received a blow on the chest in an automobile accident. A year later he died of a heart ailment. His heirs brought suit against the owner of the vehicle which collided with the deceased's vehicle, charging that the heart ailment of which the deceased died was superinduced by trauma—by the blow on his chest received in the automobile accident. No layman was competent to prove this. An objection was sustained to the testimony of the physician who had attended the deceased and who was offered by the plaintiffs to testify as to the particular heart ailment with which the deceased died; the testimony concerned the probability that decedent's death was superinduced by trauma. The plaintiffs took a nonsuit. If we assume for the purpose of the discussion that the defendants in the two cases mentioned were liable, the heirs of the decedents paid a dear price for the protection from embarrassment afforded to the decedents by the statute during their lifetimes. Had they lived and sued for personal injuries they could have waived the privilege. By wills, or under the statutes of descent and distribution, they could leave to their beneficiaries or heirs all of their worldly goods, including the causes of action mentioned, but they could

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[8] *Id.* at 271, 88 So. at 705.

not leave them the right to waive the privilege. That right was interred with their bones, never to rise again.

Following its decision in the *McCaw* case, the Court held "that the privileged communication statute is not repealed by the vital statistics act[9] unless it is repealed to the extent that a registrar's certificate made up from statistics or information obtained from the attending physician of the patient may be introduced in evidence to show the character of sickness or cause of death of the patient. But we do not decide at this time how far and to what extent the recent act modifies or annuls the former statute, because the question does not properly arise in this case";[10] and the Court would not qualify the rule announced in the *McCaw* case on the theory that the testimony of the doctor would not have tended to tarnish the reputation or discredit the testator, but, on the contrary, would have been to his credit.[11] In a three-three decision the Court held that the statute does not apply in a manslaughter case.[12] Later decisions ruled that hospital records consisting of nurses' and doctors' reports are protected by the privilege;[13] that an instruction that the jury should not draw unfavorable inferences against the defendant because he did not introduce plaintiff's physician as a witness was reversible error as authorizing the jury to draw unfavorable inference to plaintiff;[14] that chiropractors are not within the privilege[15]; that the privilege extends to a physician called into consultation by the examining physician;[16] that the statute does not extend to nurses employed in hospitals;[17] that the statute does extend to a nurse employed by the physician who is treating the patient;[18] that where a physician examines a person by direction of the Court or prosecuting attorney to ascertain condition of person for purposes of trial the privilege does not arise;[19] that a dentist does not come within the privilege.[20] In *Keeton v. State,*[21] Justice Anderson, the writer of the majority opinion, said:

> "The majority of the court hold that the statute applies to criminal as well as civil cases, except in Maddox v. State, 173 Miss. 799, 163 So. 449 (1935), it was held that the statute had no application to the testimony of the physician of the victim in a murder case. The writer is of the opinion that the statute has no application to criminal cases. Furthermore, he is of the opinion that where the subject-matter of the privileged communication is

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[9]Miss. Code (Hemingway 1917) §§ 4869-4874.
[10]Hunter v. Hunter, *et al.,* 127 Miss. 683, 692, 90 So. 440, 441 (1921).
[11]Watkins, *et al.* v. Watkins, *et al.,* 142 Miss. 210, 106 So. 753 (1925).
[12]Davenport v. State, 143 Miss. 121, 108 So. 433 (1926).
[13]Metropolitan Life Ins. Co. v. McSwain, 149 Miss. 455, 115 So. 555 (1927).
[14]Hobson v. McLeod, 165 Miss. 853, 147 So. 778 (1933).
[15]S. H. Kress & Co. v. Sharp, 156 Miss. 693, 126 So. 650 (1930).
[16]Provident Life & Acc. Ins. Co. v. Chapman, 152 Miss. 747, 118 So. 437 (1928).
[17]Goodman v. Lang, 158 Miss. 204, 130 So. 50 (1930).
[18]Miss. Power & L. Co. v. Jordan, 164 Miss. 174, 143 So. 483 (1932).
[19]Norwood v. State, 158 Miss. 550, 130 So. 733 (1930).
[20]Gulf, M. & N. R. R. v. Willis, 171 Miss. 732, 157 So. 899 (1935).
[21]175 Miss. 631, 167 So. 68 (1936).

> made an issue in the case (whether civil or criminal), and the party making it an issue divulges the matter by introducing one or more of his physicians, the ban of secrecy is lifted—the confidential matter is thereby published to the world, and the way is opened for the other side to go into the question in the same way. . . . .
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> "The decisions of our court to the contrary, the writer thinks, ought to be overruled; the construction they put upon the statute comes dangerously near, in a civil case, violating, if it does not actually do so, the equal protection clause of the Federal Constitution (Const. Amend. 14, Sec. 1). . . ."[22]

Subsequently, the Court held[23] that in a murder prosecution a physician's testimony that a bullet taken from the daughter of the accused who was injured in the affray between accused and deceased was of the same caliber as accused's gun, to refute the accused's statement that deceased had shot accused's daughter, was admissible, since the privilege existing between the physician and accused's daughter could not operate in favor of accused.

As stated above, the early decisions construing the statute were extremely liberal to the patient invoking it. The testimony of the physician could not be elicited even in the absence of the jury for the purpose of making a record. It was the duty of the trial court to ascertain *in limine* whether the relationship of physician and patient existed, and, if it did, to cut off all further testimony. A number of the trial judges would not permit counsel, in arguing the case to the jury, to make the slightest reference to the fact that the patient had invoked the privilege. Since the Legislature, and not the courts, was responsible for the statute, such ruling by trial judges was not wholly illogical. The theory was that the Legislature would hardly have contemplated conferring a right on the patient and then let that right be nullified or impaired through criticism of the patient for invoking the right.

An exception to the trend of the early decisions in construing the statute with great liberality to the patient is found in *Sovereign Camp, Woodmen of the World, v. Farmer,*[24] wherein the Court upheld the validity of a waiver of the privilege contained in an application for a policy of insurance. The Court cannot be justly criticised for the limit to which it went in its liberality toward the patient. After all, the responsibility for the statute rested with the Legislature, and not the Court. In recent years the pendulum has been swinging back. Neither can the Court be criticized for the trend of recent decisions toward ameliorating the rigor of the statute as previously construed. The Court had the benefit of the prac-

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[22]*Id.* at 648, 649, 167 So. at 71.
[23]Vance v. State, 182 Miss. 840, 183 So. 280 (1938).
[24]116 Miss. 626, 77 So. 655 (1917).

tical operation of the statute as construed, and undoubtedly observed the instances in which justice was frustrated and freak results followed some applications of the statute as previously construed. In recent years, the Court has held that in a homicide prosecution exclusion as privileged of testimony of insane hospital physicians as to knowledge of deceased's insanity acquired from perusal of hospital records was error;[25] that the statute does not prevent physical and X-ray examination of parts of plaintiff's body which were alleged to have been injured and which were voluntarily exhibited to the jury for inspection and examination;[26] that an instruction that plaintiff's failure to use physician who attended him after injury sued for, as a witness, may create a presumption that such physician's testimony would have been unfavorable to plaintiff was not erroneous as abolishing the protection of the statute;[27] that by the adoption of the statute permitting introduction of records of vital statistics the Legislature intended to except from the operation of the privileged communications statutes the vital statistics records.[28] This last was the question left open in *Hunter v. Hunter*.[29] It has also been held that the benefits of the statute may be waived by contract before trial;[30] that where an insured voluntarily presented himself to a physician employed by the insurer in order that the latter might examine the insured and report his findings to the insurer, and not for the purpose of receiving treatment, the expense of the examination being paid by the insurer, the privilege did not arise.[31]

While the rule announced in the case of *Dixie Greyhound Lines v. Matthews*[32] is just and sound and supported by much respectable authority, its practical operation is left, to a considerable extent, to the discretion of the trial judge. The Court held that the defendant could have the examination "under such reasonable restrictions as the court might require." The request for such an examination naturally comes during the progress of the trial because it can be made only after the plaintiff has exhibited the injured parts of his body to the jury. Some examinations, in order to be of value, might require considerable time. Some might require that the plaintiff be kept under observation for considerable time. The question is as to how long the trial judge would be willing to suspend the trial while the examination is being made. Furthermore, the question might frequently arise as to whether the plaintiff has "voluntarily" exhibited the injured portions of his body to the jury. If he does not do so during examination by his own counsel, but makes such exhibition at the request of the cross-examiner, has he done so "voluntarily"?

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[25]Motley v. State, 174 Miss. 568, 165 So. 296 (1935).

[26]Teche Lines v. Bounds, 182 Miss. 638, 179 So. 747 (1938); Dixie Greyhound Lines v. Matthews, 177 Miss. 103, 170 So. 686 (1936).

[27]Gillings v. Metropolitan Life Ins. Co., 187 Miss. 265, 192 So. 577, 131 A. L. R. 684 (1939); Robinson v. Haydel, 177 Miss. 233, 171 So. 7 (1936).

[28]Life & Cas. Ins. Co. v. Walters, 180 Miss. 384, 177 So. 47 (1937).

[29]127 Miss. 683, 90 So. 440 (1921).

[30]Fornea v. Goodyear Yellow Pine Co., *et al.*, 181 Miss. 50, 178 So. 914 (1937).

[31]Metropolitan Life Ins. Co. v. Evans, 183 Miss. 859, 184 So. 426 (1938).

[32]177 Miss. 103, 170 So. 686 (1936).

Rule 35 of the Federal Rules of Civil Procedure provides that in an action in which the mental or physical condition of a party is in controversy the Court may order him to submit to a physical or mental examination on motion and notice. A discussion of the authorities construing this rule would draw this article out to undue length. For those interested in pursuing the question further, one of the leading cases is *Sibbach v. Wilson and Co.*[33] Closer home, the District Court of the United States for the Southern District of Mississippi, in an able and excellently reasoned opinion[34] dealing with the whole question of discovery under the Rules, held:

> "There is a statute in Mississippi which provides that communications between physician and patient shall be privileged and not disclosed except at the instance of the patient, and the Supreme Court of Mississippi has held that the court is without power to compel the plaintiff to submit himself over his objection to a physical examination. It is my judgment, however, that Rule 35 prevails in the trial of cases in the federal court and supersedes the procedural statute and holding of the state court in Mississippi. The motion for the physical examination, therefore, will be sustained to the extent that the court will order the plaintiff to submit himself for physical examination to a physician designated by the court and not necessarily the one requested by the mover."[35]

The Model Code of Evidence recently published by the American Law Institute was originally drawn without any such privilege as afforded by our statute.[36] At the last minute, however, attorneys from states having statutes similar to the one under discussion forced the draftsmen of the Code to insert three sections[37] establishing the privilege. Fortunately, however, numerous limitations and safeguards are incorporated in these sections, which will prevent a repetition of many of the miscarriages of justice and freak results that flowed from such statutes as construed by the courts in the various states where they are in force. Time and space will not admit of a full discussion of these sections of the Model Code of Evidence. Reference is merely made to them for the convenience of those interested in further study thereof. Suffice it to say that the limitations imposed upon the privilege greatly improve the law in states where such privilege now exists.

Section 35 of the "Proposed Mississippi Civil Procedure Act of

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[33]312 U. S. 1, 61 Sup. Ct. 422, 85 L. ed. 479 (1940), *rehearing den.*, 312 U. S. 713, 61 Sup. Ct. 730, 85 L. ed. 1144 (1940).

[34]Leach v. Greif Bros. Cooperage Corp., 2 F. R. D. 444 (1942).

[35]*Id.* at 446.

[36]See proposed final draft (March 16, 1942) submitted to the annual meeting, May, 1942.

[37]RESTATEMENT, EVIDENCE (1942) §§ 221-223.

1944,"[38] prepared by the Study Committee of the Mississippi State Bar, is a step in the right direction. It is evidence of the consensus of the able and learned members of that Committee that there is great need for reform in this particular field. That, however, such proposed change is all that can be desired is subject to some doubt. Frequently, the mental or physical condition of a person is put in issue by one other than himself and in suits other than those for damages on account of personal injury or death. Let us suppose that *A* applies for a policy of life insurance containing total and permanent disability benefits. He makes claim for such benefits and it is denied. He brings suit and puts his physician on the stand to prove his disability. Under Section 35 he thereby waives the privilege and the defendant may offer such other physicians as are available. Suppose the insurer denied liability on the ground that A's application for the policy contained misrepresentations regarding A's health. The insurer may bring an action in equity for rescission and cancellation of the disability benefit provisions. The insurer has the burden of making out its case in chief or else, when it rests, the insured is entitled to a decree dismissing the bill. The insurer cannot offer the insured's physicians over the insured's objection because, at that stage of the case, he has not offered "himself or any physician or surgeon or any other person as a witness to testify" as to his physical condition.

Suppose *A* dies within two years after the issuance of the policy which contains a clause that it shall become incontestable within two years from its date of issue. The insurer claims that the policy was void *ab initio* on account of the misrepresentations in the application therefor. Two courses are open to the insurer: It may await action on the policy by the beneficiary and, if such is brought within the two years it may defend on the grounds mentioned. Such procedure is dangerous, because the beneficiary may wait the two years out, and the insurer would then have no defense. To protect its interests, the insurer should bring an action in equity against the beneficiary for a cancellation of the policy. As in the other illustration

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[38]It reads as follows:

"Section 1536, Chapter 28, of the Mississippi Code of 1930 is hereby amended to read as follows:

"'All communications made to a physician or surgeon by a patient under his charge or by one seeking professional advice are hereby declared to be privileged, and such physician or surgeon shall not be required to disclose the same in any legal proceeding, except at the instance of the patient, or, after his death, at the instance of his personal representatives, or any one of the heirs at law;

"'Provided, however, that consent shall be deemed to have been given to any physician or surgeon in every civil suit, action, or prosecution which has been brought by any person for damages on account of personal injuries or death and in all cases in which a party to a suit, action or proceeding shall offer himself or any physician or surgeon or any other person as a witness to testify to the physical or mental condition of such party;

"'And provided further, that after the decease of such patient, in a contest upon the question of admitting the will of such patient to probate, any one of the heirs at law of such patient, whether propopents or contestants of his will, shall be deemed to be personal representatives of such deceased patient for the purpose of waiving the privilege hereinbefore created.'"

used, the insurer has the burden of proof and must make out its case in chief. Section 35 is of no avail and unless the insurer can prove its case by testimony other than that of the insured's physicians, it must fail. Illustrations demonstrating the deficiencies of Section 35 could be multiplied, but those mentioned should suffice to show that the section does not go far enough.

No pretense is made that all of the aspects of the privileged communications statute have been developed or all of the authorities construing it cited. It may be seen, however, that the statute as now construed by the Supreme Court of Mississippi is of little value to the patient. For instance, the patient must make the unhappy choice between letting his physician testify at the risk that such physician will minimize his injuries, or else shoulder the burden of having the solemn and weighty voice of the Court tell the jury that it may presume that, had the physician testified, his testimony would have been unfavorable to the plaintiff. Furthermore, the patient must forego exhibiting the injured portions of his body to the jury or else incur the risk of having the trial halted while his adversary's doctors check his claims of injury. Furthermore, the patient knows that after he is dead the very privilege created for his benefit may be invoked by the adversaries of his heirs or personal representatives.

Section 35 will relieve him of some of these burdens, but at the same time it will strip him of the privilege in the vast majority of cases. Under the circumstances, why should the Legislature not follow Hamlet's advice to the players, "O, reform it altogether!"? There are, of course, exceptions to all rules; but doctors have as strong a sense of professional ethics as any professional group in existence. Most of them faithfully observe the oath of Hippocrates. At the same time, there is no group of men having a higher sense of the public welfare. If they were convinced that the disclosure of medical secrets in the court room would promote the administration of justice and serve the public good, they would be the first to advocate the reform. Again, while there are exceptions to all rules, the great majority of them could be depended upon to observe sacredly the oath taken upon mounting the witness stand to reveal the truth, whether hurtful or helpful to their patients' causes.

CODE-MAKING IN MISSISSIPPI

*Edwin Stacey Oakes**

Statutes are sometimes spoken of as the grist of the legislative mill; a truer metaphor would liken them to a tapestry, the pattern of which grows increasingly complex as the weaving proceeds, and from which the legislature, like the faithful Penelope, unweaves at one time what it wove at another. In the words (with a trifling emendation) of a familiar quotation,

> "New occasions bring new statutes,
> Time makes ancient good uncouth."

In consequence, a periodical reexamination and restatement of the statutory law of a general nature have been found to be a necessity in every jurisdiction; and Mississippi has been no exception. Since the organization of the Territory of Mississippi there have been thirteen officially recognized recompilations, besides supplements, one abortive revision, and one not officially recognized. Nine of these were (Mr. Hutchinson's fulminations notwithstanding[1]) revisions. The recent publication of the latest of the series, the Code of 1942, lends present interest to the genesis and development of these recompilations.

Toulmin's Digest: The first of Mississippi's statutory compilations was the Digest of Harry Toulmin, originally containing 64 acts, to which were added the 1807 Acts of the Territorial General Assembly. This Digest was declared, by Act of the Territorial General Assembly in 1808, to supersede all previous Acts of the General Assembly and all statutes of England and Great Britain.

Turner's Digest: The next compilation, entitled "Statutes of the

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[1]"A revision, by one person, or even by a delegated committee, however capable and patriotic, in this age and country, must be a questionable undertaking. It is for the People, by their Senators and Representatives, admonished and restrained as they are by a plain and permanent written Constitution, to enact, change or abrogate Statutes, as experience may prompt. A revision is followed by fresh litigation, and a new train of decisions to interpret and fix the new law. Neither a Solon, nor a Numa, nor any sole lawmaker is now wanted.

"A Digest purporting to include 'only the laws now in force' must ever be inadequate. Nay more; such a publication has ever been and must ever be an imposture. Who is he who would dare assert, that the laws of his own selection are all the laws that are in force? Legislation is often obscured, conflictive, in repetition, amendatory, enlarging or restraining, and often solemn adjudications are sought to settle what are the governing statutory rules. Moreover, it is not the legislation in force at a particular date that is needed by the Officers of the government and the People. They want and must have all the provisions, of whatever date, which may bear upon and regulate the numerous questions of public, social, and individual concernment. Again, after the action of the very next Legislature, the distinctive trait of such a digest is dissolved, and then, more than at its introduction, it can serve only to delude." MISS. CODE (Hutchinson 1848) Preface, p. 6.

Mississippi Territory," was made by Edward Turner under authority of the Territorial Legislature, and contained the laws in force at that day up to 1816, arranged under alphabetical heads in 528 pages; for this work the compiler was allowed $1000.

Poindexter's Revision: Statehood was conferred upon Mississippi in 1817, and in 1821 the Legislature delegated to George Poindexter, then Governor, the duty of revising, amending, and consolidating all existing statutes of a public nature and to report to the Legislature by bills as to defects, after receiving suggestions from the superior judges and the Attorney General. For this work the Legislature allowed him $1200, with a clerk on pay at sixteen cents for every one hundred words; and subsequently allowed an assistant at $600. A Resolution of June 29, 1822, tendered to the Revisor "the gratitude of the state for the service aforesaid, and an elegant copy of the Encyclopaedia." The compilation was declared by the Legislature to supersede all previous laws of a general nature (saving all rights which might have accrued, and actions commenced thereunder, together with the right to prosecute for offenses committed), but not to affect acts of local application or of personal or private nature.

Pray's Revision: A subsequent revision, made in 1833-1836 at the direction of the Legislature by P.R.R. Pray (who had been President of the Constitutional Convention of 1832), was not adopted; instead, in 1837 the Legislature ordered a Reprint of the public acts since the revision of 1823, of which 2500 copies were printed.

Howard & Hutchinson's Digest of 1840: The revision of 1823 and the Reprint above mentioned were taken, together with the Session Laws of 1839, as the basis of Howard and Hutchinson's Digest of 1840—the work, presumably, of the then State Reporter, Volney E. Howard, and of A. Hutchinson, later the compiler of Hutchinson's Code. Mr. Hutchinson said that because of the erroneous assumption that the Revised Code "contained all the public acts up to 1823 proper for a Digest of the Laws in force, and that the Reprint of 1838 included all general enactments from 1824 to 1838 inclusive . . . and on account of the haste of its preparation, the Digest was greatly defective."[2] However, the legislature appropriated $12,000 for 1500 copies of it.

Hutchinson's Code of 1848: With a view to repairing these deficiencies, Mr. Hutchinson set to work, in May, 1843, to examine the Territorial statutes and the Session Acts of the state Legislature, and to arrange such of them of a general nature as proved to be in force or to be "essential criteria of existing and dependent rights," under a plan of arrangement based upon the Analysis of Blackstone's Commentaries. The compiler remarked apropos of his arrangement, that "this fact is thus stated to anticipate the cavils of those whose arrogance might not otherwise be re-

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[2]Miss. Code (Hutchinson 1848) 68.

buked." With this work the compiler, except when engaged in professional pursuits, was, in his own phrase, "arduously occupied" for nearly five years. "To those who have not entered upon such a task," he says, "the time, attention, care and toil required must be quite unappreciable."[3] His painstaking work was, however, to set a pattern for the Codes which followed it.

The result was a volume of 1111 pages, published by the compiler. It contains, in addition to the statutes, the Federal Constitution, the Mississippi Constitutions of 1817 and 1832, the Act of Congress of April 7, 1798, forming the Mississippi Territory, the Cession by the State of Georgia, the Acts of Congress extending the Territory of Mississippi over territory acquired by the Treaty of Paris and over part of West Florida, and the Act for admission of the State to the Union. The Legislature purchased two thousand copies, and directed that it should be deemed as published by the authority of the Legislature and to be taken as evidence of the laws of the State.

Code of 1857: The next in the series of statutory compilations was the Revised Code of 1857. This was a legislative revision, prepared by a commission appointed by Judges of the High Court of Errors and Appeals under legislative authorization to revise, digest and codify the laws of this State, and to propose such alterations or amendments thereof, and such new laws, as they may deem expedient. The report of the Commissioners, who were William Sharkey, Henry T. Ellet, and William L. Harris, was with amendments and modifications, adopted by the Legislature, which enacted a blanket repeal, with the usual saving clause, of the Acts therein revised, and of earlier legislation repugnant to the provisions of the Code.

Five thousand copies of the work, which contains 943 pages, were ordered printed, and the Commissioner who superintended its publication and made the index was allowed the sum of $3000.

Code of 1871: The next revision, also a legislative revision, is the Revised Code of 1871, a volume of 788 pages, prepared by a Commission composed of J. A. P. Campbell, Amos R. Johnston, and Amos Lovering. On its adoption by the Legislature as superseding all pre-existing statutes of a general nature, six thousand copies were ordered printed, on a cost-plus-40% basis. One thousand dollars were allowed to a Commissioner for supervising the publication and making an index. The price of the book was to be fixed by the Governor "in view of the cost of the work and its value, having reference to the price of other law books of similar finish and dimensions published elsewhere."

Code of 1880: The Mississippi Code of 1880 was prepared at the direction of the Legislature by J. A. P. Campbell, a member of the Commission which had prepared the previous code, and was duly adopted by

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[3] *Id.* Preface.

that body, which authorized the printing of five thousand copies. The book contains 941 pages, and is noteworthy as being the first of the Mississippi Codes to contain references to relevant decisions, no attempt, however, being made to state their holdings. For his services in preparing annotations, indexing the book, and superintending its publication, Mr. Campbell was allowed the sum of $3500.

Code of 1892: Next came the Annotated Code of 1892, prepared by R. H. Thompson, George G. Dillard, and R. B. Campbell as Commissioners appointed, pursuant to provision made by the State Constitution of 1890, "to prepare and draft such general laws as are contemplated in this Constitution, and such other laws as shall be necessary and proper to put into operation the provisions thereof, and as may be appropriate to conform the general statutes of the state to the Constitution." The result was an entire revision of the general statutes of the state, not only as to subject matter, but also as to language. "Our Statutes," says the author of the preface, "have been written by the hundreds of men, the learned and the unlearned, the sententious and the verbose, who have been members of the legislature. In many instances, too, they have been written under the most unfavorable circumstances. One man's composition is frequently injected into another's, wholly different in style, presumably by way of amendment, while statutes have been copied with variations from every quarter. The result of all this is painfully manifest on our statute books. The jargon of the law, the 'saids,' the 'suches' and 'aforesaids,' the 'provisos' and 'provided furthers,' the verbosity, the endless tautology, the involution of case within case and parenthesis within parenthesis, have engendered in the minds of many people an idea that multiplied efforts at certainty are essential, and that statutes have to be written in a different language from ordinary composition."[4]

This is the first of the Codes to state, by way of annotating the statutes, the substance of Mississippi decisions deemed by the Commissioners to be helpful, omitting those which, by reason of change in the statute of variant subsequent decisions, might prove misleading. The reason given was that the sixty-eight volumes of the Mississippi Reports, with all the learning contained therein, were, to the average citizen, to the justice of the peace, the supervisor, and many others charged with the administration of our laws, practically inaccessible and unused. "The labor involved in this work," the Commissioners feelingly remarked, "can never be appreciated by those who have not entered upon an undertaking of the kind."

This Code is a book of 1253 pages, in which the 145 chapters are alphabetically arranged. By Act of the Legislature, it superseded all prior statutes re-enacted in or repugnant to the Code.

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[4]Miss. Code (1892) Preface.

Code of 1906: The Code of 1906 was the work of a Commission consisting of A. H. Whitfield, T. C. Catchings, and W. H. Hardy, appointed by authority of the legislature to revise, arrange and classify all the statute laws of this State of general nature into one Code, and to make annotations of the decisions of our Supreme Court to all such statute laws of the state, and to all sections of the Constitution of the state as have been construed or passed upon by said court, and to make citations of the decisions of the Supreme Court of the United States and of the Constitution of the State of Mississippi and of the United States.

The volume, which adheres to the arrangement of the Code of 1892, is of 1531 pages; and the Legislature, (evidently in an expansive moment) authorized the printing of eight thousand copies, and, contingently, of an additional two thousand copies. Twelve hundred dollars were allowed for indexing.

Hemingway's 1917 Code: The next Code, which was produced by private enterprise, was compiled by William Hemingway. By this time the statutory law had grown so bulky that it required division into two volumes, totalling 3509 pages. The arrangement of each volume was alphabetical, by statutes. Volume one was intended to be a practice code; Volume two was devoted to matters not relating to practice. Analyses at the head of the respective chapters were introduced, the annotations brought down to date, and the cases in the annotations grouped under each section according to the date of the Code in effect when the decision was rendered. The Codes of 1892 and 1906 had each given, in parenthesis following the section numbers, the number of the corresponding section of the preceding Code. This feature was continued in Hemingway's Code; and additional assistance in identifying the Code of 1906 and subsequent legislation with sections of the new Code was afforded by parallel tables.

Hemingway's 1927 Code: This was essentially a new edition, brought down to date, of Hemingway's 1917 Code. It also is in two volumes, containing a total of 4140 pages.

Code of 1930: This time legislative revision was again used, and the work of preparing a new Code was entrusted to a Commission composed of J. Morgan Stevens, Charles L. Crum, and V. A. Griffith, of which R. T. Mobley was Clerk. The material, making 2931 pages, exclusive of the index, was divided into two volumes, in each of which the chapters were arranged in alphabetical order of the chapter headings. The plan was to include in the first volume, so far as possible, those laws most frequently consulted. The annotation was brought down to date.

Like other legislative revisions, it was declared by the legislature to supersede all previous laws of a general nature therein revised. A new feature was the giving for each section of the corresponding section numbers of every previous official code of the state, and of Hemingway's 1917

Code, back to and including Hutchinson's Code of 1848. Transfer tables were not provided.

According to the Commissioners, "We have accomplished most in the elimination of dead matter and of duplications. Out of the present enormous and somewhat confused mass of nearly ten thousand present sections, we have made a reduction of nearly three thousand sections, or about thirty per cent. And we have done much in many chapters in a better arrangement of the sections." Three thousand sets were ordered by the state.

An unofficial supplement, edited by R. T. Mobley, was published in 1938.

Code of 1942: The Code of 1942, while compiled and published under official supervision, by direction of the Legislature, is not a legislative revision, superseding earlier Codes and statutes. It is a rearrangement of such of the 1930 Code material as has survived repeal, incorporating the later Session Acts down to and including those of 1942. While retaining the most useful features of its predecessors, it presents certain differences, all of which stem from a recent invention in the law book field—the pocket supplement. A pocket supplement performs two useful functions. First, it makes possible the recompilation, at convenient intervals, of supplemental material, so that there is at all times only one supplement to consult, and it most conveniently locates that supplement inside the covers of the volume supplemented. Second, it prolongs the life of the set of the books in which it is employed by keeping them down to date, and, in the case of a multi-volume set, makes it possible, whenever any one supplement outgrows the space provided, to replace individual volumes rather than the whole set, with a resultant saving to the owner.

Obviously, the more volumes into which a Code is divided, the longer can their pocket supplements be continued. On the other hand, the desirability of having kindred matter in a single volume imposes a limit on the number of volumes. The 1942 Code, therefore, is so designed as to group under 42 titles, apportioned among seven volumes, matters logically belonging together, retaining, however, in each title an alphabetical arrangement based on the chapter headings. The plan of arrangement was worked out, under the general supervision of the Hon. Greek L. Rice, Attorney General, and the Hon. George H. Ethridge, Assistant Attorney General and former judge of the Mississippi Supreme Court, and by R. T. Mobley, formerly Secretary of the 1930 Code Commission and editor of the 1938 Supplement to the Code of 1930.

Each of the seven volumes has its own index and transfer table, and an eighth volume contains a general index, a combined transfer table, and other tables accounting for 1930 Code sections and later Session Acts which, for the reasons therein indicated, are properly omitted from the 1942 Code.

From this account of Mississippi code-making, it is apparent that the record is one of progress. Each successive code has marked an advance; and each may truly be said to represent the labor, not merely of its immediate compilers, but also of those who preceded them.

SHOULD BUREAUS BE SUBSTITUTED FOR OUR PROBATE COURTS?

*Gibson B. Witherspoon**

I. *Estates of Veterans of World War I.*

Estates of veterans of World War I were administered under the law existing in the state where the veteran was domiciled, subject to the able supervision of the Veterans Bureau of the various states. The work of the Veterans Bureau was splendid. They held the court costs, attorneys' fees, and administrative expenses to a minimum and always were alert to see that the result obtained was to the best interest of the veteran's estate. Under the Uniform Veterans law,[1] which has been enacted in all the states, copies of petitions were submitted to the Veterans Bureau before being taken up with the courts. Often objectionable features were eliminated and the best available investments were obtained for the estate. Thus each estate was safeguarded by all the laws of the several states plus the wisdom and experience which the able attorneys of the Veterans Bureau were able to render. Apparently, this was a desirable combination and reached near perfection in protecting the estates of the deceased veterans and preserving the corpus for the time in the minor's life when it was most needed for educational purposes.

II. *The New Law for Veterans' Estates of World War II.*

Section 21 of the World War Veterans' Act of 1924, as amended up to July 13, 1943,[2] provided that where payment of any compensation, pension, or insurance was to be made to a minor or to any person under other legal disability adjudged by a court of competent jurisdiction, the payment might be made to the legally appointed guardian. If the latter were not properly executing his duties, the Administrator of Veterans' Affairs of the United States Veterans' Administration[3] could appear in the court which had appointed this fiduciary and call the matter to the court's attention. He could also suspend payment, holding the funds in the Treasury to the credit of the beneficiary. But the person normally in charge of the funds was a judicially appointed and controlled guardian.

Not being satisfied with this developed system of handling estates of veterans and wishing to abandon the safeguards established through years of experience, Congress passed on July 13, 1943, an amendment to this Section which demands the closest scrutiny by the bench and bar. The new subsection (4) of Section 21 is as follows:

"(4) Any benefit payable or paid by the Veterans' Adminis-

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[1]Miss. Code Ann. (1930) c. 175.

[2]49 Stat. 607 (1935), 38 U. S. C. A. § 450 (Supp. 1942).

[3]46 Stat. 1016 (1930), 38 U. S. C. A. § 11 (Supp. 1943).

tration shall be subject to the applicable provisions of Sections 454a and 556a of this title, as now or hereafter amended: *Provided,* That in any case of an incompetent veteran having no guardian, payment of compensation, pension, or retirement pay may be made in the discretion of the Administrator to the wife of such veteran for the use of the veteran and his dependents: *And provided further,* That payment of death benefits to a widow for herself and child or children, if any, may be made directly to such widow, notwithstanding she may be a minor. Section 44 of this title is hereby repealed and any other law in conflict herewith is modified accordingly."[4]

The alleged purposes of the passage of the above amendment, according to testimony before a Congressional Committee, are:

"1. To provide uniform application of World War Veterans Act of 1924 as amended and other provisions of Public Law No. 262.

2. To afford more flexible administrative actions and centralize the control of all cases under a Washington Bureau, regardless of the rights of the several states to safeguard the rights of its incompetent and unfortunate citizens.

3. The direct payment of all the money to the beneficiaries without the small amounts depleted by:

   a. Guardians' Commission
   b. Attorneys' Fees, and
   c. Court Costs incident to Guardianships, etc."[5]

III. *Should Established Safeguards Be Abandoned for Speculative Benefits?*

Under the first alleged purpose for the enactment of this amendment, "to provide uniform application of veterans' estates," it should be remembered that each state has already enacted what is universally called a "World War Veterans' Act." Under its provisions each petition is presented to the Veterans Administration in each state before being filed and taken up with the court. If there are no objectionable features in the petition, the Veterans' Chief Attorney returns a waiver. On the other hand, if there are objectionable features in the proposed petition, the Chief Attorney of the state offices of the Veterans Administration points out the objectionable features to the local attorney handling the matter, and us-

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[4] 57 STAT. 554 (1943), 38 U. S. C. A. § 450 (Supp. 1943).

[5] Letter of Nov. 5, 1943, from Frank T. Hines, Administrator Veterans Administration, to J. E. Rankin, M. C., and Chairman of the Committee on World War Veterans Legislation.

ually the petition is re-drafted and the objectionable portion thereof is omitted. In a very few cases the petition is filed regardless of the objection and the reasons therefor. In such cases the Chief Attorney of the Veterans Administration files objections and the chancellor or judge of the Probate Court decides the issues. Thus it would appear that the laws are uniform in the several states, and that all the safeguards as prescribed by the various states should be preserved.

The Veterans Administration has supervision in all veterans' estates under the old law as administered in Veterans' Estates of World War I. The oft-heard criticism of bureaus' wanting to have more and more power seems applicable in answering the first alleged benefit of the new act. The efficiency which has been effected in the handling of estate cases in the first world war should be utilized instead of abandoned. The experience gained should prove a beacon light to safeguard the estates of veterans of World War II.

The boys in the armed forces are fighting to preserve life as they know it and not as it might be administered by some bureau. It is safe to say that the insurance premiums which they pay for the support of their wives and children are intended to be subject to the safeguards with which they are familiar: to the administration of a court of competent jurisdiction, which will preserve the best interest of their loved ones, by preventing the squandering of a lump-sum payment.

Concerning the second alleged purpose for the enactment of this amendment, namely, to afford more flexible administrative action and centralize all the estates of the veterans of this war under the control of a Washington bureau, it is submitted that the various state courts should be utilized and that the states' established safeguards should govern the administration of these estates. That procedure has proved satisfactory in the handling of estates of World War I; so, why should it be changed?

It is admitted that Federal grants can be given to anyone the government may smile upon, under the *Jeremiah Hall* case,[6] but there is a serious legal question presented where there is a sacred contract between a soldier of this war and the United States, payable to certain beneficiaries who are under the disability of minority. Can some administrator take a valid release from a minor of tender years or from a widow who is sweet sixteen? At the conclusion of war in 1918, all of our courts held that the Government could be sued on these contracts of insurance. Suppose a minor, after reaching his majority, should sue the Government for his insurance money, on the theory that it was wrongfully paid to his mother, who was incompetent to handle the estate and who spent the money herself without giving him any of the benefits. Certainly there would be at least some equity in his claim. If this amendment to Section 21 were declared invalid by our Supreme Court because it violated the rights of the several

[6]United States v. Hall, 98 U. S. 343, 25 L. ed. 180 (1879).

states as guaranteed under our sometimes forgotten Constitution,[7] would the Federal Government then be liable for another payment to the proper legal guardian of the minor?

The Act containing this amended sub-section was originally passed by Congress on July 13, 1943, and provides for "payment of compensation or retirement pay-death benefits to a widow for herself and child or children if any," this notwithstanding the widow might be a minor. The President signed the act a few days later; and with the ink hardly dry, the Veterans Bureau, on July 16, 1943, sent out a form letter to every state office in America advising them not only that the Act applied to payment of compensation pensions, retirement pay, and death benefits, as Congress specifically designated in the Act, but also that it applied to all insurance of personnel discharged from the military or naval forces of the United States. Can it be said fairly that Congress intended to include insurance money in this act? The very fact that it was left out would indicate that Congress wanted to exclude insurance payments.

The third and last reason advanced by the administrator in support of this objectionable new amendment is possibly the underlying purpose for the enactment of this provision into law. Guardians' commissions usually amount to approximately five per cent of the expenditures. In normal times, when the Government is not lending money, most investments earn more than this commission, and everyone knows that the guardian earns every cent of these small fees, as do the clerks of the courts. So the basic reason for the entire act, I think, is to cut the attorneys of the country out of making any fees at all from veterans' estates arising from this war.[8] Apparently we have another example of the forgotten man—the lawyer—who is completely left out by this new legislation. Yet if the attorney charged too much for his services under the old law, the attorneys for the Veterans Bureau immediately objected and equitable fees were invariably paid. Thus a most uniform fee schedule for attorneys was actually in force throughout America.

IV. *Possible Applications of the Amendment.*

Let us consider some practical applications of this law.[9] Assume some eighteen-year old widow, whose soldier husband was killed in Italy

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[7]In 1823, Jefferson said, "I ask for no straining words against the Government, nor yet against the States. I believe the states can best govern over home concerns and the General Government over foreign ones. I wish therefore to see maintained that wholesome distribution of power established by the Constitution for the limitation of both and never see all offices transferred to Washington." NORTON, THE CONSTITUTION OF THE UNITED STATES (1940) 226.

[8]See resolution passed by Miss. State Bar, (1943) 15 MISS. L. J. 319.

[9]Jesse Stuart, winner of the Thomas Jefferson award for 1943, gives us an example of this in TAPS FOR PRIVATE TUSSIE. When Kim Tussie was killed in action, the Bureau paid his illiterate wife, Vittie, $10,000 insurance money in one lump sum. The author shows the natural sequence of events which normally happened when an illiterate relief family was paid $10,000 cash. The tragedies in this novel will be enacted in real life in hundreds of cases, unless our present law is changed.

and who is left with one child. The insurance money is paid directly to her; she receives the child's part for its use and benefit. The widow marries again and other children are born to this new couple. The mother spends her money for a home. The soldier's son has his money in the bank, and the mother hopes to educate him in the State University. But the children of the second marriage become ill and must be hospitalized; so the mother from time to time spends the inheritance of the soldier's son, and when he is old enough to go to college, his money has disappeared and he must go to work instead. This wrong could well occur under the statute, under which guardians' commissions and small attorneys' fees were saved to this estate.

Numerous illustrations could be cited. In every state, each surety company, lawyer, and chancery clerk could add some regrettable cases in which the corpus was wasted; but, because of the surety bond, no loss resulted to the infant heirs of the estates.

It is stated that a guardian may be appointed under this new law. This is true, but how many will be appointed if the Federal Government will pay directly to the widow without a guardianship? The attorney for the Government may approach the widow with a check for $10,000. He may say,

> "I will pay this over to you now and you may use it as you desire, or you may have a guardian appointed, but you will have to pay the guardian's commissions, pay court-costs, bond premiums, and, of course, attorney's fees. Every time you want to spend something, the court will pass on it, etc."

In nearly every case the widow would take the money, and she would become subject to all the hazards which might befall a person incompetent and inexperienced in handling money.[10]

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[10]Joseph W. Henderson, President of the American Bar Association, states, "I am a good deal concerned that we of the American Bar Association and the legal profession do the job which is expected of us, and do it soon and well. The rising tide of criticism of arbitrary administrative action no longer comes chiefly from lawyers or their clients but from the rank and file of folks, who now are finding out that arbitrary and unchecked administrative action affects their lives and liberties too. As someone said the other day: 'They are tired of being kicked around.'" (1943) 29 A. B. A. J. 681.

UNCONSTITUTIONAL LEGISLATION IN MISSISSIPPI*

Huey B. Howerton†

III. The Three Departments

A. The Judiciary

The Supreme Court.

The Supreme Court held its first term in June, 1818. During the life of the first Constitution (1817-1832) the Court rendered 393 reported decisions and one unreported decision of considerable interest, previously discussed.[1] Of the reported decisions, only one involved unconstitutional legislation.

The case arose from facts involving the prerogatives of the Court itself.[2] By constitutional authority the Legislature created a Probate Court.[3] Also by constitutional authority the judge of the court appointed a clerk who could be removed only by the Supreme Court.[4] Later the Legislature abolished the office of clerk and transferred the duties to the office of judge.[5]

In determining the constitutional inability of the Legislature to pass this act, the Court said in part:

> "The only question now to be considered is does the act of the 30th of June, 1822, contravene the constitution of this state, so far as it relates to the rights of the present plaintiff. In the opinion which will be expressed on this momentous question, I cannot feel insensible either as it regards the 'magnitude of the case' or the delicacy of our situation. I have repeatedly said it was unwise and inexpedient to declare laws unconstitutional where there is any doubt and when they might be reconciled to the spirit, if not to the letter of the constitution. But the people of this state have formed a paramount rule of action for themselves, and they have declared the powers of the government of this state shall be divided into three distinct departments, and each of them to be

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*This is the second installment of an article begun in the preceding issue, 16 Miss. L. J. 88. Sections of the unpublished manuscript thesis, on file in the University of Mississippi Law School Library, not printed in these two installments, deal with schools, electorate, public officers, boards of supervisors, Civil War, and constitutional amendments.

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[1]Cochrane and Murdock v. Benjamin Kitchens, *et al.*, Supreme Court, June Term, 1824, not reported officially; see (1944) 16 Miss. L. J. 88, 95.

[2]Runnels v. State, Walk. 146 (Miss. 1823).

[3]Miss. Const. (1817) Art. V, § 7.

[4]*Id.* § 11.

[5]Miss. Laws 1822, Act of June 30.

> confided to a separate body of magistracy: to wit, those which are legislative to one—those which are executive to another, and those which are judicial to another.
>
> Upon this court then devolves the high and important duty of rescuing from legislative violation those contracts which have their origin in the constitution and are placed beyond the reach of legislative control and interference."[6]

It was some time after the case of *Runnels v. State,* just discussed, before the Court was again called on to protect itself against legislative interference with its constitutional powers. It is interesting that the Court did not wait until a case arose under the unconstitutional statute, but without any direct constitutional authority rendered an advisory opinion.[7]

The Legislature sought to divide the State into four Supreme Court districts, and to require the Court to hold a term once a year in each district.[8] It restricted the cases to those arising within each district. In invalidating this act, the Court pointed out that the Constitution provided that the Court should meet twice a year,[9] and that this meant the hearing of cases in both terms arising from all portions of the State. An amendment to the Constitution retained in substance the previous constitutional provision.[10] The Court stated the Legislature could, following the constitutional mandate,[11] divide the State into three districts for the election of the Judges; but when that power had been exercised, the power to district the State for any purpose connected with the Court was exhausted. When the Court met, it was to consider cases pending from all over the State.[12]

On one other occasion the Court was asked to render an opinion but it refused.[13] As reported, it was simply an exchange of letters between the President pro tempore of the Senate and the Secretary of State and a letter signed by four of the Judges in reply to an inquiry from the Secretary of State. The question arose as to whether the President pro tempore of the Senate (who is a member of that body) should continue, in the case of the death of the Governor, to preside over the Senate after his term had expired and until the newly-elected Lieutenant-Governor had been inaugurated.[14]

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[6]Runnels v. State, Walk. 146 (Miss. 1823).

[7]Opinion of the Court construing the Act of the Legislature, 41 Miss. 54 (1866), approved February 21, 1867. This is the only instance of the Court's invalidating a statute through an opinion. *Cf. In re* Opinion of the Justices, 148 Miss. 427, 114 So. 887 (1927).

[8]Miss. Laws 1867, c. 376, §§ 1-3, pp. 474-476.

[9]Miss. Const. (1832) Art. IV, § 7.

[10]*Id.*, Amend IX, adopted in convention August 23, 1865.

[11]Miss. Const. (1832) Art. IV, § 2.

[12]The act also violated the provision of the Constitution concerning open courts.

[13]*In re* Opinion of the Justices, 148 Miss. 427, 114 So. 887 (1927).

[14]The Senators' terms expired Dec. 31, 1927; the newly-elected Legislature convened Jan. 3, 1928; the Lieutenant-Governor was to be inaugurated some two weeks after the convening of the new Legislature.

The Court based its refusal on that provision of the Constitution which sets up the three departments of government[15] and stated that this section impliedly prohibits the giving of advisory opinions by one department to another, except as another section of the Constitution may so provide.[16] Then turning to the only provision of the Constitution which authorizes an opinion by the Court,[17] it pointed out that such opinion could be given only on the following matters: first, the question of whether a vacancy existed in the office of the Governor; second, the question of whether the Governor were unable, on account of protracted illness, to discharge his duties; and third, the question of whether the Lieutenant-Governor, President pro tempore of the Senate, or Speaker of the House, were disqualified or unable to discharge the duties of the office of the Governor. The questions to be answered were only such as related to the discharge of the duties of Governor.

Jurisdiction.

The Constitution provides that the Supreme Court shall have such jurisdiction as properly belongs to a court of appeals.[18] A provision of a statute which denies the lower court the power to grant new trials for excessive verdicts, but permitted the Supreme Court to reverse the case when it considered the verdict of the jury excessive,[19] was declared unconstitutional.[20] It was for the benefit of plaintiffs and it shut out defendants from having complete and final disposition of their rights. It compelled defendants to appeal and sought to give the Supreme Court original instead of mere appellate jurisdiction.[21]

Appellate jurisdiction includes only such as is of a revisory character and it necessarily implies that the matter revised must be a judicial decision rendered by a tribunal clothed with judicial power. A statute[22] which purported to authorize direct appeals from the Railroad Commission to the Supreme Court was declared void.[23] It was found, by reference to the statute creating the Commission,[24] that the Commission was an administrative agency, it nowhere having been given the power to apply the law to a state of facts and to make final declarations. To uphold the statute authorizing appeals would be to make the Court an advisory agency of another department of government, and this, by implication, is prohibited.

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[15]Miss. Const. (1890) Art. I, § 1.
[16]The Court cited 15 C. J. 785 in substantiation of the point.
[17]Miss. Const. (1890) Art. V, § 13.
[18]*Id.* § 146.
[19]Miss. Code (1906) § 4910.
[20]Yazoo & M. V. R. R. v. Wallace, 90 Miss. 609, 43 So. 469 (1907).
[21]The statute violated also trial by jury and the power conferred by the Constitution on the Circuit Court.
[22]Miss. Laws 1908, c. 86, p. 71.
[23]Illinois C. R. R. v. Dodd, 105 Miss. 23, 61 So. 743 (1913).
[24]Miss. Code (1906) § 4836.

In like manner, the Legislature could not make the Supreme Court an administrative agency for enforcing laws pertaining to court stenographers. A provision of an act sought to punish court stenographers who refused to file a transcript of records, the motion therefor to be filed with the Supreme Court.[25] The jurisdiction sought to be conferred by this act was not in aid of the appellate powers of the Court, was not such as properly belonged to a court of appeals, and therefore, it was void.[26] Neither was the Supreme Court the body to whom a stenographer should apply for an extension of time to file transcripts, so the Court held in another case.[27] These transcripts were to be filed in the trial court and did not become a part of the record on appeal until finally disposed of by the lower court. Hence a statute which attempted to provide otherwise could not be upheld.[28]

The Legislature sought to say in a provision of an act concerning the appeal of a case that the Court should sit in banc on it.[29] The Court said that the Legislature could not prescribe when it should sit in banc and when in divisions.[30] The Constitution regulated this matter, giving to the Court itself considerable discretion.[31]

The Circuit Court.

The Legislature reduced the number of circuit court districts but provided that the act should not take effect until the expiration of the terms of the judges.[32] However, it forgot about the district attorneys and sought to remedy the matter by a subsequent act[33] which gave the Governor power to assign the district attorneys. The appellant in this case[34] was left out, being unassigned both as to duties and district. If upheld, the act would have had the effect of removing through legislative sanction a constitutional officer during a constitutional term. Incumbency was shown to be as important as the existence of the office, and the Legislature could no more abridge the one than it could abolish the other.[35]

A provision of a statute, as previously brought out,[36] which undertook to prevent the circuit court from exercising the power to grant new trials for excessive verdicts was unconstitutional. Not only did it seek to

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[25]MISS. ANN. CODE (Supp. 1921) § 584; Miss. Laws 1920, c. 145, § 1, p. 797c.

[26]Robertson v. Southern Bitulithic Co., 129 Miss. 453, 92 So. 580 (1922).

[27]State v. White, 153 Miss. 697, 119 So. 807 (1927); *see* Geiselbreth v. Miss. Power & L. Co., 166 Miss. 749, 147 So. 874 (1933).

[28]MISS. CODE ANN. (Hemingway 1927) § 598.

[29]Miss. Laws 1935, c. 19, § 15, ¶ (d), pp. 47-48.

[30]Tillman v. Massa, 177 Miss. 170, 170 So. 641 (1936).

[31]MISS. CONST. (1890) Art. XV, § 287.

[32]Miss. Laws 1876, c. 58, § 1, p. 52; c. 59, §§ 1-2, pp. 53-54.

[33]Miss. Laws 1877, c. 24, §§ 1-5, pp. 43-44.

[34]Fant v. Gibbs, 54 Miss. 396 (1877).

[35]*Id.* at 404. The court refers to a previously pronounced unconstitutional statute which undertook to create the office of tax-collector in the several counties and to deprive the sheriffs of the duty of collecting public revenue. *Id.* at 411. No further reference to the matter has been located.

[36]See discussion *supra* p. 205.

grant original jurisdiction to the Supreme Court, but it denied the defendant the right to have complete disposition of his case in a forum provided by the organic law for the administration of justice to all.[37]

The Legislature could constitutionally provide[38] that no criminal case should be reversed by the Supreme Court because of an error or omission in the records of the lower court pertaining to matters not jurisdictional (of which, arraignment and plea are illustrative); but it would be unconstitutional[39] for the Legislature to provide for nonreversibility of an act pertaining to jurisdictional matters, of which there are many illustrations.[40]

The Chancery Court.

An early case (the first dealing with the chancery court) involved the constitutionality of a statute[41] which authorized the Governor to appoint a vice-chancellor to hold office "until the next general election in 1843, and until his successor is qualified." And since there was no provision of the law under consideration nor any general statute on the subject which provided for a method by which a successor could become qualified, and since the Constitution provides for the tenure of office to be for some limited time,[42] the particular provision of the law involved[43] was invalid.[44]

A statute[45] which authorized the probate court to grant letters of guardianship to the father of a minor was unconstitutional.[46] The Constitution created the probate court and defined its jurisdiction.[47] As has been previously determined,[48] none but a fatherless child is an orphan; and since the jurisdiction of the probate court is confined to orphans' business, the statute was in conflict with the Constitution and, therefore, void.

A statute sought to allow a suit on the bond of an administrator to be filed in chancery court.[49] The Court held that this statute enlarged the

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[37]Yazoo & M. V. R. R. v. Wallace, 90 Miss. 609, 43 So. 469 (1907). *See* Miss Eastern Ry. v. Wymond Cooperage Co., 93 Miss. 73, 46 So. 577 (1908).

[38]Miss. Code Ann. (1892) § 4370.

[39]No provisions mentioned by the Court.

[40]Arbuckle v. State, 80 Miss. 15, 31 So. 437 (1902), overruling Hunt v. State, 61 Miss. 577 (1884).

[41]Miss. Laws 1842, c. 3, §§ 1-18, pp. 57-58; Miss. Code (Hutchinson 1848) c. 54, Art. 20, §§ 1-18, pp. 775-779.

[42]Miss. Const. (1832) Art. I, § 3.

[43]Miss. Laws 1842, c. 3, § 13.

[44]Houston v. Royston, 7 How. 543 (Miss. 1843). Another part of the law in this case provided for the appointment of a clerk of the court by the Vice-Chancellor; but apparently the Court overlooked its constitutionality, for the decision in the case was not based on this provision of the act as being in conflict with Miss. Const. (1832) Art. IV, § 19, which provided for the election of the clerk by the qualified electors.

[45]Miss. Rev. Code (1857) § 16, Art. 142, pp. 459-560.

[46]*Ex parte* Atkinson, 40 Miss. 17 (1864).

[47]Miss. Const. (1832) Art. IV, § 18.

[48]Stewart v. Morrison, 38 Miss. 417 (1860).

[49]Miss. Rev. Code (1871) § 976, p. 191.

constitutional jurisdiction[50] of such court and was, therefore, invalid.[51] The Court pointed out that this statute sought to confer on the chancery court a type of action for which there was a full and adequate remedy at law; that whenever courts of equity exist, their jurisdiction should be kept separate and distinct from that of the courts of common law. Bonds are legal obligations, and suits to recover damages for the breach of their conditions were shown to be properly cognizable in the courts of law.[52]

A very recent case sought to test the constitutionality of a provision of an act under which the State Tax Commission approved two additional sales tax assessments against appellant. The statute under which the Commission acted[53] provided in one section[54] that "no injunction shall be awarded by any court or judge to restrain the collection of the taxes imposed by this act." This provision was alleged to be in violation of that provision of the Constitution which confers jurisdiction on the chancery court.[55] Granted the point, the Court stated that this would not affect the remainder of the act under which the appellant was assessed, which itself was valid.[56]

Justice of the Peace.

An act of the Legislature[57] which provided that the President of the Board of Aldermen of a municipality should be commissioned yearly by the Governor as a justice of the peace and that appeal from his decisions should lie to the board of aldermen, was unconstitutional. It violated that part of the Constitution[58] which provides for justices of the peace to be elected by districts for a term of two years and for right of appeal to be allowed in all cases.[59] The Court very casually remarked that the provision of the municipal charter did not seem to harmonize with the Constitution.[60]

The Legislature sought to give exclusive jurisdiction to a municipality through its city court to regulate all fines imposed for violations of State laws within certain minimum and maximum amounts.[61] The Court held that by this act the Legislature sought to permit a municipality to modify or enlarge the laws of the State; that the Constitution conferred original

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[50]Miss. Const. (1869) Art. VI, § 16.
[51]Smith v. Everett, 50 Miss. 575 (1874).
[52]*Id.* at 583. The Court in this case also makes a distinction between chancery and equity. But the Constitution (1890) grants to the Chancery Court full jurisdiction of all matters in equity. See Rockett v. Finley, 183 Miss. 308, 184 So. 78 (1938), on this point, the latter case citing Griffith's Chancery Practice (1925) §§ 440, 442 and Newman v. Taylor, 69 Miss. 670, 13 So. 831 (1892).
[53]Miss. Laws 1938, c. 113, §§ 5, 6.
[54]*Id.* § 8.
[55]Miss. Const. (1890) Art. VI, § 159.
[56]Viator v. State Tax Comm., 5 So. (2d) 487 (Miss. 1942).
[57]Miss. Rev. Code (Poindexter 1824) 626.
[58]Miss. Const. (1832) Art. IV, § 23.
[59]This right of appeal was secured by law to the Circuit Courts.
[60]Agnew v. President and Selectmen of Natchez, 9 S. & M. 104 (Miss. 1847).
[61]Miss. Laws 1866, c. 63, § 7, pp. 100-102, amended by Miss Laws 1882, c. 282, § 1, pp. 309-310.

jurisdiction on the circuit courts;[62] that this fundamental law protects each department against encroachment by the others; that the people have declared to which body of men they are willing to give the power to say what shall be laws of the State; and that any law in conflict with the Constitution is void.[63]

The Legislature could not extend the jurisdiction of a mayor's court beyond the territorial limits of the municipality, the mayor by law exercising *ex officio* the jurisdiction of a justice of the peace.[64] The Legislature could empower the mayor to serve as justice of the peace within the city limits without violating the Constitution, but to permit such officer to extend his authority beyond such limits would be unconstitutional.[65]

The Legislature sought to commit the judicial administration of certain ordinances of boards of supervisors, passed in accordance with law, to mayors and justices of the peace, whether or not the act were done in their respective districts.[66] The Court held that, although the Legislature might delegate to the supervisors the authority to pass the ordinance, it could not constitutionally extend the judicial power of the justice of the peace beyond the territorial limits for which he was elected.[67]

The Courts: General.

The Legislature thought that the State should not have to pay two men for the same job and by act sought to have deductions made from the salary of a regular judge to pay for the services of a special judge who served in his place by reason of absence or disqualification of the regular judge.[68] The Constitution, however, provides that the judges of the courts shall receive a compensation which shall not be increased or diminished during their continuance in office.[68] The Court's decision was short![70] It said, "The act in question passed January 31, 1898, is plainly and palpably violative of section 166 of the Constitution of 1890—the supreme law of the State—and therefore null and void. It would be a mere waste of time to discuss so clear a proposition."[71]

The Legislature cannot abate a suit.[72] An act which sought to change the party plaintiff while the suit was pending was invalid.[73] It violated several provisions of the Constitution: the one pertaining to the separa-

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[62]Miss. Const. (1869) Art. VI, § 14.
[63]Montross v. State, 61 Miss. 429 (1883).
[64]Miss. Laws (1859-60), c. 319, § 6, p. 384.
[65]Heggie v. Stone, 70 Miss. 39, 12 So. 253 (1892).
[66]Miss. Code Ann. (1892) § 2128.
[67]*Ex parte* Fritz, 86 Miss. 210, 38 So. 722 (1905); *cf.* Heggie v. Stone, 70 Miss. 39, 12 So. 253 (1892); Montross v. State, 61 Miss. 429 (1883).
[68]Miss. Laws 1898, c. 59, p. 78.
[69]Miss. Const. (1890) Art. VI, § 166.
[70]Holder v. Sykes, 77 Miss. 64, 24 So. 261 (1899).
[71]*Id.* at 67, 24 So. at 262.
[72]Miller v. Hay, 143 Miss. 471, 109 So. 16 (1926).
[73]Miss. Laws 1926, c. 290, § 1, p. 408.

tion of powers,[74] and the one more particularly pertaining to the vesting of legislative power[75] and judicial power.[76] This was a legislative attempt to exercise a power which the Constitution vests solely in the courts.[77]

A study of the cases involving unconstitutional legislation affecting the judiciary indicates that the Legislature has respected the integrity of the courts to a marked degree. In one case it would seem that it thought the courts could work a little harder; in another it sought to compel the Supreme Court to concentrate its business a little more; the cases dealing with jurisdiction were not an effort to transgress on the courts; deductions from the salary of the judges possibly were a natural impulse, but the Supreme Court refused to allow the Legislature to become impulsive. The point is well-taken that the Legislature in its dealing with the courts has had no disposition to feel vindictive because of the exercise by the courts of the right to sit in judgment on the ability of the Legislature to "guess" what the law is.

B. The Executive: The Governor

An interesting point dealing with the powers of the Governor applicable to procedure in signing a bill was brought up in a suit of mandamus[78] against the State Auditor by a State employee to compel the payment of a salary. The Auditor claimed that the office was abolished;[79] and the State employee claimed that the act seeking to abolish his office was void because the Governor signed the bill after the adjournment of the Legislature. The Court upheld the contention of the appellant and declared the act of the Governor illegal; hence the act of the Legislature was void and of no effect.

Although the Court overruled[80] the point involved in the case, i. e., that the Governor cannot sign a bill after adjournment of the Legislature, it is interesting to compare the reasoning of the Court in both cases.

In denying the power of the Governor to sign a bill after the Legislature adjourned, the Court pointed out that the Constitution[81] provides four ways by which a bill may become a law: (1) by the Governor's affixing his signature; (2) by the Legislature's overriding the Governor's veto with a two-thirds majority vote of both Houses; (3) by the Governor's withholding his signature for five days while the Legislature is still in ses-

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[74]MISS. CONST. (1890) Art. I, §§ 1, 2.
[75]*Id.* § 33.
[76]*Id.* § 144.
[77]The Court cited Lawson v. Jeffries, 47 Miss. 686 (1873) and Isom v. Miss. C. R. R., 36 Miss. 300 (1858). See also Miller v. Johnston, 144 Miss. 201, 109 So. 716 (1926); Miller v. Globe-Rutgers Fire Ins. Co., 143 Miss. 489, 108 So. 180 (1926); Johnson v. Reeves, 112 Miss. 227, 72 So. 925 (1916).
[78]Hardee v. Gibbs, 50 Miss. 802 (1874).
[79]Miss. Laws 1873, c. 101, p. 110.
[80]State v. Board of Sup'rs of Coahoma County, 64 Miss. 358, 1 So. 501 (1886). *Cf.* MISS. CONST. (1890) Art. IV, § 72.
[81]MISS. CONST. (1869) Art. IV, § 24.

sion; and (4) by the Governor's failure to return the bill within three days after the meeting of the succeeding Legislature. The last is the only constitutional way by which a bill may become a law following the adjournment of the Legislature.[82] The Court quotes from Judge Cooley[83] in making the point that the Governor in signing a bill is performing a legislative act; and unless the Constitution allows further time, this act must be performed before the Legislature adjourns. The Governor, as a branch of the Legislature, can do no legislative act after the adjournment of that body.

Nevertheless, in answer to this point and in overruling it without hesitation,[84] the Court declared that the previous holding "is not supported by reason or authority, and plainly shows a lack of attention to or comprehension of the language of the Constitution."[85] Even though the act of signing a bill is a legislative one, it is as Governor that the bill is signed and the Governor holds his office after the adjournment as well as before. If by adjournment the Legislature prevents the return of the bill before the Governor has had five days to act, he is allowed all the time before the three days at the beginning of the next session in which to return the bill disapproved; and if he does not return it, it becomes a law. But there is not a word in the Constitution to suggest that the Governor should be limited to the period of the session in performing his agency in making laws.[86]

Another case of interest involved the veto power of the Governor.[87] Here the constitutionality of the act was involved insofar as the Court disallowed any positive action thereby. The act *per se* was not unconstitutional. Appellee prosecuted a mandamus suit to compel the Auditor to issue him a warrant for services rendered, the suit being based on the theory that the appropriation bill covering his remuneration had become a law.[88] The bill as presented to the Governor provided, among other things, that appellee devote his entire time to the duties of the office which he occupied. The word "entire" had not been used previously as it applied to the position under consideration. The Governor vetoed this provision as engrafting legislation on appropriation measures in contravention of the Constitution,[89] but approved the balance of the bill.[90] The Court held that the proviso concerning the devoting of entire time to the job had a reasonable relation to securing the purposes for which the institution[91] was established

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[82]Hardee v. Gibbs, 50 Miss. 802, 807 (1874).

[83]*Id.* at 809.

[84]State v. Board of Sup'rs of Coahoma County, 64 Miss. 358, 1 So. 501 (1886).

[85]*Id.* at 364, 1 So. at 501.

[86]This decision was rendered before the adoption of the Constitution of 1890. Section 72 forbids such procedure.

[87]Miller v. Walley, 122 Miss. 521, 84 So. 466 (1920). See State *ex rel. v.* Holder, 76 Miss. 158, 23 So. 643 (1898).

[88]Miss. Laws 1920, c. 38, p. 47.

[89]Miss. Const. (1890) Art. IV, § 69.

[90]See *Id.*, § 73, which gives the Governor the "item veto."

[91]In this case, the State Charity Hospital, Jackson.

and for which the appropriation was made; but inasmuch as the bill was not returned to the Legislature and passed over the veto, and as the five days which the Governor is allowed to retain a bill had not expired,[92] the bill was still, in legal contemplation, in the possession of the Governor.[93]

More explicitly, the bill did not become a law because the proviso of giving "entire" time to the work is broader than the meaning found in the Constitution relative to the devoting of time to the office;[94] and since the bill had failed to receive the Governor's approval and had not been in his possession five days before the adjournment of the Legislature, it did not become a law, as previously stated. And it would not become a law until it had followed the procedure laid down in the Constitution, that is, that a bill should become a law unless returned by the Governor within three days after the beginning of the next session of the Legislature.

As affirmed previously,[95] the Governor cannot veto a condition of an appropriation act and approve the appropriation without the condition imposed by the Legislature. The Court did not decide what the duties of the Governor might be with reference to returning a bill of which he approves part and vetoes part.[96]

In invalidating a statute[97] which conflicts with the pardoning power of the Governor as prescribed in the Constitution,[98] the Court pointed out that the humaneness of the act could not be taken into consideration in determining its validity.[99] The Legislature sought to authorize a board of supervisors to discharge a convict on a certificate of infirmity after he had served thirty days. The sole power to pardon is given to the Governor and cannot be delegated.[100]

Summary. The cases affecting the powers of the Governor have dealt more with procedural than substantive law. By judicial interpretation, the time during which the Governor might sign a bill was limited to the duration of the legislative session and later extended to any time between sessions. In order to settle the matter, the framers of the Constitution of 1890 provided that no bill should be approved when the Legislature was not in session. The Governor could not use the item veto to disapprove a provision setting out the conditions on which money should be drawn from the treasury, since such action would confuse the constitutional grant to the respective departments of government. If the item of an appropria-

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[92]The bill was presented to the Governor April 2, 1920, the Governor disposing of it on April 3 and the Legislature adjourning the same day.
[93]See MISS. CONST. (1890) Art. IV, § 72.
[94]*Id.* § 267.
[95]State v. Holder, 76 Miss. 158, 23 So. 643 (1898).
[96]Miller v. Walley, 122 Miss. 537, 84 So. 468 (1920).
[97]Miss. Laws 1908, c. 109, p. 104, particularly § 3, p. 105.
[98]MISS. CONST. (1890) Art. V, § 124.
[99]State v. Kirby, 96 Miss. 629, 51 So. 811 (1910).
[100]Runnels v. State, 154 Miss. 621, 122 So. 769 (1929); State v. Jackson, 143 Miss. 745, 109 So. 724 (1926).

tion bill were approved, the condition attached thereto would have to be accepted.

The Constitution gives to the Governor the sole power to pardon and no other agency can exercise it. However, this does not prevent the setting up of a pardoning board to make recommendations to the Governor.

C. The Legislature

Procedure.

The extent to which the Court should assume the responsibility of requiring the Legislature to follow the constitutional commands concerning procedure has been somewhat puzzling. At first the Court held that the *Journals* could be examined.[101] Previously the Court had announced that the deposited bill was conclusive evidence of the proper enactment.[102] This was modified, the Court saying that it might be *prima facie* evidence but not conclusive.[103] If the Journals of the Houses should differ from the enrolled bill as signed by the Governor, the act must be declared null and void.[104] This doctrine, however, was soon overruled, the Court accepting the certified records of the Legislature as being final and conclusive as to the constitutional requirements.[105]

When a case is brought before the Court on a question of the constitutionality of a provision of an act and the Court upholds the act on the particular point involved, the Court will not declare the act unconstitutional on any other ground even though it may be aware of its unconstitutionality. Certainly this is the implication in a case[106] that went up to the Supreme Court for the second time.[107] The first time the Court declared that the act was not in conflict with the Constitution.[108] In the case referred to, the Court held a provision of an act unconstitutional[109] because the title of the act did not in any way mention the part of the previous law[110] sought to be amended.. Among other procedural requirements laid down in the Constitution, one section[111] provides that the title of a bill must indicate clearly the subject of the proposed legislation.

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[101]Brady v. West, 50 Miss. 68 (1874).
[102]Green v. Weller, 32 Miss. 650 (1856).
[103]Brady v. West, 50 Miss. 79 (1874).
[104]Miss. Laws 1873, c. 1, p. 5 (approved Oct. 22, 1873). Laws of 1873 include acts of two sessions of the Legislature, the acts of the October session following immediately the acts of the January session. In considering the constitutionality of Miss. Laws 1873, c. 1, p. 5 (approved Oct. 22, 1873), the Court pointed out in Brady v. West, 50 Miss. 75 (1874), that another law involved in the case (Miss. Laws 1873, c. 30, p. 45, approved April 21, 1873) had been held void in the case of *Wolfe v. Peyton.* The latter case is unreported.
[105]*Cf. Ex parte* Wren, 63 Miss. 512 (1886) (a very interesting opinion).
[106]Board of Levee Commissioners of Yazoo-Miss. Delta v. Royal Ins. Co., 96 Miss. 832, 51 So. 2 (1910).
[107]The first decision in the case may be found in 95 Miss. 168, 48 So. 183 (1909).
[108]Miss. Const. (1890) Art. XI, § 234.
[109]Miss. Laws 1908, c. 73, § 7, p. 59.
[110]Miss. Code (1906) § 3832.
[111]Miss. Const. (1890) Art. IV, § 71.

As brought out in the case, the Legislature enumerated the various sections to be amended but overlooked one. The Court pointed out that it was not necessary for the title to contain each specific section to be amended; but when they are enumerated, the Legislature must be limited in the change to those specifically named. The title to act should indicate fully what subjects of the Code were to be dealt with and any act which did not do this was in violation of the Constitution.

The foregoing case dealt with what is to be placed in the title of a bill. Another provision of the Constitution[112] prohibits the Legislature from amending a bill by reference to the title only, requiring that the amended section or sections be inserted in full in the bill. The Legislature referred in the title of an act to the section sought to be amended[113] but the act was held to be unconstitutional because it failed to insert in full in the chapter the Code section as amended.[114]

Separation of Powers.

The Court has pointed out that the principle of the separation of powers must be observed. The framers of the Constitution desired that there should be three separate, distinct departments and that unless otherwise constitutionally granted, each department should remain separate.

The Legislature cannot interpret the law. It may determine what the law shall be, but the Court must say what the law has been. To illustrate, any construction placed on a statute by the Court which would have the effect of exempting a railroad from taxation in disregard of the existing law (the taxes being due), would be permitting the Legislature to interpret its own laws. This could not be allowed.[115]

Neither could the Legislature authorize a municipality to declare what constituted a nuisance and abate it without judicial process. Such procedure is preeminently a judicial matter and the Court seemed to be astonished that the Legislature would disregard so flagrantly the principle of the separation of powers.[116]

The Court ruled that when private property was taken for public use,

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[112]MISS. CONST. (1890) Art. IV, § 61.

[113]Miss. Laws 1912, c. 232, p. 304, the title indicating the desire to amend MISS. CODE (1906) § 3074.

[114]Seay v. Laurel Plumbing & Metal Co., 110 Miss. 834, 71 So. 9 (1916). *Accord,* Buford v. State, 146 Miss. 66, 111 So. 850 (1926). *See* Thomas v. State, 150 Miss. 504, 117 So. 119 (1928); Raines v. State, 148 Miss. 70, 114 So. 126 (1927); Johnson v. State, 146 Miss. 593, 111 So. 595 (1927); Holmes v. State, 146 Miss. 351, 111 So. 860 (1926).

Only part of the act was declared invalid. In a specially concurring opinion, one of the members of the Court stated that he felt that the whole statute was unconstitutional and that the prior holding of the Court was wrong; but he believed it to be the duty of a judge to follow the rule of stare decisis. This placed him with the majority of the Court.

[115]McCulloch v. Stone, 64 Miss. 378, 8 So. 236 (1886).

[116]Quintine v. City of Bay St. Louis, 64 Miss. 483, 1 So. 625 (1886).

compensation must be made first and the payment should be in money and not in enhanced value of the remaining property. When a Legislature sought to permit a jury to take such enhanced value into consideration in assessing damages, the Court ruled that this violated the principle of the separation of powers, that it was a judicial matter to determine whether a person had been properly paid.[117]

In a case of much later date, the Court held that the abatement of a suit by the Legislature was certainly violative of this principle.[118] In like manner, an act of the Legislature which classified counties for purposes of assessment and which arbitrarily fixed minimum-maximum values therein, assumed to do what the Constitution grants to the Court for determination.[119]

Summary. Just as it took the Court some time to decide the matter of the veto power of the Governor, so it has been a little uncertain just how far it should go in looking into the *Journals* of the respective Houses to enforce constitutional commands relating to procedure. The matter is not easily determined.

Respect for a coordinate branch of the government would lead to an acceptance by the Court of the signed statements of the Legislature that bills had been passed according to constitutional requirements. But the Court was placed on judicial notice that such was not the case. The Constitution commanded; the Legislature had not complied. What should the Court do about it?

At first the Court said that the *Journals* could be examined to see if a bill had been properly passed; then it said that the bill as deposited in the office of the Secretary of State was conclusive evidence of the correct enactment of the statute; then it hit upon the happy medium in deciding that such depositing of the bill might be *prima facie* evidence but not conclusive. The framers of the Constitution (the responsibility should not be placed on the Court) did not intend that the signatures of three officials—the presiding officers of the Senate and House respectively, and the Governor—should be accepted as final proof of the proper passage of an act. If the *Journals* should differ from the bill as signed, the bill should be declared a nullity. Finally, the Court emphatically declared that the bill as deposited was conclusive evidence and the *Journals* of the Houses could not be looked into for evidence.

The Court could and would look at the title of a bill, however, to see whether it conformed to constitutional requirements and, if it did not, the act was void. This referred not only to the provision that a title must indicate clearly the subject matter, but also that the Legislature could not amend a bill by reference to the title only.

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[117]Isom v. Miss. C. R. R., 36 Miss. 300 (1858).
[118]Miller v. Hay, 143 Miss. 471, 109 So. 16 (1926).
[119]Hawkins v. Mangum, 78 Miss. 97, 28 So. 872 (1900).

IV. Taxation; Special Legislation

A. Taxation

Privilege tax.

The first case involving the constitutionality of a privilege tax to come before the Court concerned the rolling stock of a railroad company, the latter claiming exemption under its amended charter[120] from all taxation until eight years after the road had been in operation. The Court declared very briefly that the Legislature was prohibited from levying a tax before the expiration of the period.[121]

In searching for revenue the Legislature imposed a privilege tax on "each land timber mill company," but provided that the tax would not apply to sawmill operators who did not ship lumber out of the State.[122] The Court held[123] that the act violated the provision of the Constitution which declares that "taxation shall be uniform and equal throughout the State";[124] that it discriminated between subjects of property ownership of the same class;[125] and that the section under consideration was practically a tax on interstate commerce.[126]

The Legislature sought to impose a privilege tax of twenty-five cents per acre on certain lands.[127] The Court held the act void as in violation of the constitutional mandate that "property shall be taxed in proportion to its value."[128] In deciding the case[129] the Court pointed out that ownership is not a privilege conferred by government but one of the rights which governments were organized to protect; that property is synonymous with the right of ownership; and that property may signify, and in the section of the Constitution under consideration does signify "things owned." It further said that in order for a thing to be owned, some person must, of course, have a right to the ownership thereof; that a tax on a thing is a tax on all its essential attributes; and that a tax on an essential attribute of a thing is a tax on the thing itself.[130] Hence a tax on a thing owned is necessarily a tax on the right of ownership thereof; and a tax on the right of ownership of a thing is necessarily a tax on the thing itself. The

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[120]Miss. Laws 1886, c. 90, § 4, p. 133.

[121]Grand Gulf & P. G. R. R. v. Buck, 53 Miss. 246 (1876). Although no constitutional provision was mentioned by the Court, the elimination of the exemption from taxation before the end of the period specified in the charter would be in violation of Miss. Const. (1869) Art. I, § 9, which prohibited impairing the obligation of contracts.

[122]Miss. Laws 1900, c. 43, § 8, p. 44.

[123]Adams v. Miss. Lbr. Co., 84 Miss. 23, 36 So. 68 (1904).

[124]Miss. Const. (1890) Art. IV, § 112.

[125]The Court cited a number of cases including Adams v. Kuykendall, 83 Miss. 571, 35 So. 830 (1903).

[126]*See* 4 Tiedeman, State and Federal Control (1915) 490; 2 *id.* at 1032.

[127]Miss. Laws 1912, c. 112, pp. 94, 95.

[128]Miss. Const. (1890) Art. IV, § 112.

[129]Thompson v. Kreutzer, 112 Miss. 165, 72 So. 891 (1916).

[130]*Ibid. See* Thompson v. McLeod, 112 Miss. 383, 73 So. 193 (1916).

Court concluded that since the tax in the case before it was one on property and was not levied in proportion to its value, the act could not stand.

On the same principle that was involved in the *Thompson v. Kreutzer* case,[131] the Court held invalid a statute seeking to impose a privilege tax or occupation fee on firms extracting turpentine, the tax being fixed at one-fourth of one per cent. each year for each cup or box.[132] Such a tax could operate only as a tax on property; it was not a tax on the business but a tax on the property involved. By a divided Court,[134] it was held to be in violation of Section 112 of the Constitution.

The Legislature imposed a fixed charge on the gross receipts of a freight line company in lieu of all taxes on the property of the company used in its business.[135] The Constitution, however, provides that taxation shall be equal and uniform and that property shall be assessed for taxes according to its true value.[136] In invalidating this act,[137] the Court pointed out that under the Constitution of 1869 the Legislature, with the approval of the Court,[138] did impose privilege taxes in lieu of ad valorem taxes; but that the Constitutional Convention of 1890 rewrote the section and provided that property should be assessed at its true value, as above pointed out. No substitute was permissible. There should be no discrimination in rates between different kinds of property, all property being taxed at the same rate.

Another tax ruling by the Court held that a tax on the citizens of the State for ownership of stock in a foreign corporation was in effect a property tax,[139] and that thus the privilege tax sought to be levied[140] was unconstitutional.[141] It was not unconstitutional, however, for the Legislature to impose taxes on the shares of stock of a foreign corporation owned by residents of this State; and since the act of 1924 was void, all existing laws sought to be repealed by such act were held to be in full force and effect.[142]

Summary. If the charter of a railroad company granted exemption from taxation for a certain length of time, the Legislature was required to respect it. The Legislature, in levying a privilege tax, could not discrimi-

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[131] *Ibid.*
[132] Miss. Laws 1912, c. 110, p. 91.
[133] Thompson v. McLeod, 112 Miss. 383, 73 So. 193 (1916).
[134] Potter and Cook JJ., dissented.
[135] Miss. Laws 1912, c. 113, p. 95.
[136] Miss. Const. (1890) Art. IV, § 112.
[137] Chicago, R. I. & P. R. R. v. Robertson, 122 Miss. 417, 84 So. 449 (1920).
[138] Citing Telegraph Co. v. Adams, 71 Miss. 555 (1893); Bank v. Worrell, 67 Miss. 47 (1889).
[139] Holden, J., and Smith, C. J., dissenting.
[140] Miss. Laws 1924, c. 129, p. 132.
[141] Barnes v. Jones, 139 Miss. 675, 103 So. 773 (1925). In invalidating the act, the Court cited Thompson v. McLeod, 112 Miss. 383, 73 So. 193 (1916), and Thompson v. Kreutzer, 112 Miss. 165, 72 So. 891 (1916).
[142] Barnes v. Jones, 139 Miss. 675, 103 So. 773 (1925).

nate between property owners of the same class, or levy such a tax on lands since a land tax is a property tax, and property must be taxed in proportion to its value and not by arbitrary amount. This same rule was applied to a tax on firms extracting turpentine.

Although the Legislature could and did impose privilege taxes in lieu of ad valorem taxes under the Constitution of 1869, the Constitution of 1890 prohibited this. Hence a fixed charge on the gross receipts of a company in lieu of all taxes on property owned by the company was void. It was also void for the Legislature to levy a privilege tax on the right of residents to own stock in foreign corporations. Such a tax is a property tax.

Assessment.

When some citizens of a county obtained the services of attorneys to secure a reduction in assessment of taxes, thus saving the county several thousand dollars, and paid the attorneys' fees themselves, the Legislature could not by act[143] compel the Board of Supervisors to levy taxes for a refund.[144] It was not a legitimate exercise of legislative power to impose the burden of taxation on a county to pay what it did not in any just sense owe. The Court ruled that although the attorneys had through chancery proceedings secured a reduction of the millage,[145] such proceedings were for private parties; and that taxes could never be assessed and collected except for public purposes.[146] The Legislature was not the depository of the rights of property of the citizen who holds by the higher tenure of the Constitution, with the judiciary it creates as its guardian.[147]

The ascertaining of the value of property for assessment is a judicial function and one which the Legislature cannot perform.[148] Accordingly, an Act of the Legislature[149] which sought to divide the counties into classes, to subdivide the land therein into classes based on the quality of the land, and arbitarily to fix minimum and maximum values, within which range the tax assessor should confine himself, was void. The Constitution provides for a tax assessor;[150] and the assessment of property shall be equal and uniform throughout the State, the tax being in proportion to value, which is to be ascertained by law.[151] This does not mean that the Legislature may assess property; it may enact laws by which the values are to be ascertained, though it shall not ascertain them.[152]

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[143]Miss. Laws 1882, c. 461, p. 740.

[144]Board of Sup'rs of Warren County v. Cowan & McCabe, 60 Miss. 876 (1883).

[145]See Beck v. Allen, 58 Miss. 143 (1880), overruling Board of Sup'rs of Warren County v. Klein, 51 Miss. 807 (1876), and Gamble v. Witty, 55 Miss. 26 (1877).

[146]Board of Sup'rs of Warren County v. Cowan & McCabe, 60 Miss. 876, 884 (1883).

[147]*Id.* at 885.

[148]Hawkins v. Mangum, 78 Miss. 97, 28 So. 872 (1900).

[149]Miss. Laws 1888, c. 9, p. 24.

[150]Miss. Const. (1869) Art. V, § 21.

[151]*Id.* Art. XII, § 20.

[152]Hawkins v. Mangum, 78 Miss. 108, 28 So. 872 (1900), citing 25 Am. & Eng.

In another decision it was shown that an assessment made under an unconstitutional law was void,[153] and that a tax sale based thereon was not aided by a statute of limitations.[154] However, if the land purchased under the tax sale were actually possessed and occupied for the period prescribed, the sale would be held valid notwithstanding the fact that the act[155] had been declared unconstitutional.[156]

By judicial interpretation, the Legislature cannot alter the constitutional method of assessing property by seeking to delegate this power to some officer other than the tax assessor spoken of in the fundamental law. An act[157] which attempted to authorize the State Revenue Agent to assess and collect past due ad valorem taxes, was unconstitutional.[158] It violated two provisions: one pertaining to substance and procedure,[159] and the other pertaining to the person to whom the responsibility was delegated.[160] The object of this act was to vest unlimited power and discretion in a State officer, which procedure is a total departure from the principles of the Constitution.

All assessments must be made under general law, and any act of the Legislature which should seek to authorize one county to follow a special procedure not applicable to all counties[161] was unconstitutional.[162]

Property acquired after the date fixed by general law[163] for assessment for ad valorem taxes (which date in Mississippi is February 1 of the year for which taxes are to be paid) does not have to be entered on the assessment rolls: it is not subject to taxation for the balance of the year. Hence a legislative provision[164] which sought to compel the payment of taxes on stocks of goods by a business begun after February 1, whose property was acquired after that date, was unconstitutional.[165] Not only did such an act violate the equality and uniformity clause of the Constitution[166] but it conflicted with the constitutional provision which sets out that corporations shall be taxed in the same way and to the same extent as individuals.[167]

Enc. L. 65, and the message of Governor Stone of March 31, 1892, vetoing an act similar to the one under consideration.

[153]Coffee v. Coleman, 85 Miss. 14, 37 So. 499 (1904).

[154]Eastland v. Yazoo Delta Lbr. Co., 90 Miss. 330, 43 So. 956 (1907).

[155]Miss. Laws 1888, c. 9, p. 24.

[156]Hammer v. Yazoo Delta Lbr. Co., 100 Miss. 349, 56 So. 466 (1911).

[157]Miss Code Ann. (1892) c. 126, §§ 4190-4193.

[158]State Revenue Agent v. Tonella, 70 Miss. 701, 14 So. 17 (1893).

[159]Miss. Const. (1890) Art. IV, § 112.

[160]*Id.* § 138.

[161]Miss. Laws 1908, c. 239, p. 230.

[162]Horton v. King, 113 Miss. 60, 73 So. 871 (1916).

[163]Miss. Code (1906) § 4257; Miss. Code (Hemingway 1917) § 6888.

[164]Miss. Laws 1908, c. 75, p. 65; Miss. Code (Hemingway 1917) §§ 6889, 6890.

[165]Reed Bros., Inc. v. Board of Sup'rs of Lee Co., 126 Miss. 162, 88 So. 504 (1921).

[166]Miss. Const. (1890) Art. IV, § 112.

[167]Miss. Const. (1890) Art. VII, § 181.

Exemptions.

In 1872 the Legislature exempted certain corporations from taxation for a period of ten years.[168] Appellant company in a case[169] which came before the Court was in existence at the time the law was passed but did not claim exemption. Later the property of the corporation was burned and Legislature extended to the company the exemption[170] which it could have received under the previous act. Before the expiration of the period of exemption allowed, the Legislature passed a general act altering and modifying the exemption against the corporation and in favor of the State.[171]

Was the exemption constitutional? Could the Legislature modify the exemption before the period had expired? These questions were answered *seriatim* by a divided Court:[172] The Constitution required that the property of all corporations organized for pecuniary profit be subject to taxation the same as that of individuals[173] and that taxation be equal and uniform throughout the State.[174] The Court held, in a rather unusual interpretation of the words, that the Legislature might exempt property of corporations or natural persons, but that corporate property should never be placed beyond the reach of the taxing power. It need not be "subjected" but it must always be "subject" to taxation, the same as that of individuals.[175]

Therefore, any construction of a statute which would give a corporation permanent exemption for a certain period of time would be unconstitutional. For this reason, the Legislature had a right to pass a later law modifying the exemption before the period allowed had come to an end.[176] The exemption act passed in 1872 and the special act granting exemption to the corporation[177] were void in that liability to taxation existed[178] but exemption could be discretionary. In a case which came later,[179] the Court confirmed the doctrine laid down, that the Legislature had the power to exempt corporations but not the power to make such exemptions irrepealable. Within a few years, however, the Court in an important decision placed the question of exemption on a much firmer ground. The Court stated very positively that the Legislature was de-

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[168]Miss. Laws 1872, c. 73, § p, p. 66.
[169]Mississippi Mills v. Cook, Tax Collector, 56 Miss. 40 (1878).
[170]Miss. Laws 1873, c. 61, p. 212.
[171]Miss. Laws 1877, c. 44, p. 72.
[172]Chalmers, J., dissented.
[173]Miss. Const. (1869) Art. XII, § 13.
[174]*Id.* § 20.
[175]Mississippi Mills v. Cook, 56 Miss. 40, 54-55 (1878), cited *supra* note 169.
[176]*Id.* at 59. The Court cited provisions of the Constitutions of Iowa, Alabama, Missouri, and California similar to those of the Constitution of Mississippi.
[177]See notes 56, 58 *supra.*
[178]*Cf.* Yazoo & M. V. R. R. v. Adams, 81 Miss. 90, 32 So. 937 (1902), cited *infra* note 191.
[179]Natchez, J. & C. R. R. v. Lambert, 70 Miss. 779, 13 So. 33 (1893).

prived of all power to exempt from taxation corporations organized for pecuniary gain.[180] The provision of the Constitution which requires the property of all such corporations to be subject to taxes the same as that of individuals[181] and the one which requires taxation to be equal and uniform and all property to be taxed in proportion to its value,[182] are mandatory.

The problem of exemption which raised the question of the validity of certain provisions of charters granted to some railroad companies was predicated on the following facts: The State Revenue Agent, proceeding under legislative authority,[183] instituted suits to recover back taxes.[184] The defendant railroad company had consolidated with another railroad,[185] the property of the latter road being the subject of the suit on which the back taxes were assessed. The defendant company pleaded a provision of the charter of the company with which it consolidated,[186] this provision being similar to a section of another charter[187] conferring exemptions on a third railroad.[188]

The Court denied the exemption claimed on two grounds: (1) Section 21 (Miss. Laws 1870, c. 113, p. 327), on its face did provide for an irrepealable exemption, and the Court must, therefore, hold it to have been in violation of the Constitution.[189] (2) It might be conceded, for the sake of argument, that the railroad company with which defendant company consolidated had an exemption; but the consolidation created a new corporation as of the date of consolidation and the exemption was subsequently cut off by a provision of the Constitution of 1890.[190]

The general subject of exemption was subsequently raised in a case involving the same parties.[191] The Court confirmed the correctness of the conclusion previously reached;[192] showed that the constitutionality of exemption was not argued in a previous decision of the Court;[193] held that if any property which was liable should escape taxation, the innocent holder of such property would have to pay the back taxes due;[194] pointed out that

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[180]Adams v. Yazoo & M. V. R. R., 77 Miss. 194 (1899), overruling Mississippi Mills v. Cook, 56 Miss. 40 (1878), cited *supra* note 169; Natchez, J. & C. R. R. v. Lambert, 70 Miss. 779, 13 So. 33 (1893), cited *supra* note 179.

[181]Miss. Const. (1869) Art. XII, § 13.

[182]*Id.* § 20.

[183]Miss. Code Ann. (1892) §§ 4187-4201; Miss. Laws 1894, c. 34, pp. 29-31.

[184]Adams v. Yazoo & M. V. R. R., and Railroad Co. v. Adams, 77 Miss. 194, 24 So. 200 (1899).

[185]Louisville, N. O. & T. Ry.

[186]Miss. Laws 1882, § 5.

[187]Miss. Laws 1870, c. 113, p. 327, § 21.

[188]*Ibid.;* the railroad was the Mobile and Northwestern.

[189]Miss. Const. (1869) Art. XII, §§ 13, 20; Adams v. Yazoo & M. V. R. R., 77 Miss. 272, 24 So. 200 (1899), cited *supra* note 184.

[190]§ 180.

[191]Yazoo & M. V. R. R. v. Adams, 81 Miss. 90, 32 So. 937 (1902).

[192]Railroad Co. v. Adams, 77 Miss. 194, 24 So. 200 (1899), cited *supra* note 184.

[193]Yazoo & M. V. R. R. v. Adams, 81 Miss. 90, 117, 32 So. 937, 947 (1902), citing Mississippi Mills v. Cook, 56 Miss. 40 (1878).

[194]*Id.* at 113, 32 So. at 945.

the determination of questions of exemption from taxation, involving the constitutional authorization of the Legislature and of legislative acts pertained to the highest and most important exercise of the judicial functions;[195] affirmed that it was one of the highest and most necessary duties of the Supreme Court to determine the constitutionality of an act of the Legislature when such question was properly presented to it for determination; and declared that this duty could not be avoided in a proper case because results not contemplated by the parties involved might be occasioned.[196]

A provision of a statute[197] which authorized a municipality to exempt from taxation bills and notes given in whole or part payment for taxable property within the city was declared void.[198] This was an effort at legislative classification which had to fall before the constitutional provision that taxation shall be uniform.[199] The classification of property for purposes of taxation when held as not violative of the constitutional provision is always coupled with the proviso, "if all of the same class are taxed alike."[200]

The Legislature sought to aid banks by providing that no city or town should impose or collect a greater tax on such banks or solvent credits than the State should impose for the same year.[201] The statute would not stand the test[202] when measured by the rules announced by Section 112[203] that: (1) property must be assessed at its true value; (2) property must be assessed for taxes under general laws; (3) property shall be taxed in proportion to its value, and taxation shall be equal and uniform.[204] In the case at bar, the bank did not pay the taxes upon its property in proportion to its value. Another ruling of the Court was that in the levying of ad valorem taxes, there should be no discrimination in rates between one kind of property and another; that each dollar of property must pay its just proportion of tax; and that the burden of government must be adjusted equally.[205]

Docket fee.

The Legislature sought to levy a docket fee on Warren County to be used in payment of the salaries of the Judge and Chancellor of that dis-

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[195]Yazoo & M. V. R. R. v. Adams, 81 Miss. 90, 103, 32 So. 937, 941 (1902).

[196]*Id.* at 120, 32 So. at 948, where the Court quotes from a famous decision of the United States Supreme Court (Marbury v. Madison) without naming the case.

[197]Miss. Laws 1884, c. 391, § 31, p. 445.

[198]Adams v. Kuykendall, 83 Miss. 571, 35 So. 830 (1903).

[199]Miss. Const. (1869) Art. XII, § 20.

[200]Adams v. Kuykendall, 83 Miss. 583, 35 So. 891 (1903). *Cf.* Adams v. Bank of Oxford, 78 Miss. 532, 29 So. 402 (1900).

[201]Miss. Laws 1894, c. 29, § 3, p. 25.

[202]Adams v. Mississippi State Bank, 75 Miss. 701, 23 So. 395 (1898).

[203]Miss. Const. (1890) § 112.

[204]Adams v. Mississippi State Bank, 75 Miss. 701, 720-21, 23 So. 395, 396 (1898).

[205]*Id.* at 722, 23 So. at 397.

trict.[206] The Court in invalidating this provision,[207] cited the constitutional provision that taxation shall be uniform throughout the State,[208] and held that such a fee was a local discrimination. Those on whom the docket fee would fall would have to contribute to a State object; they would be taxed twice, as it were, taxed to maintain courts throughout the State and taxed on their suit to maintain court in Warren County. This the Legislature could not do.

Redemption.

An interesting point was brought out in a case[209] passing on the validity of a statute which allowed one year for the redemption of land sold for taxes.[210] The succeeding Constitution (1890)[211] provided that the right of redemption by the owner should run for a period of two years. Another provision of the same Constitution[212] stipulated that all statutes repugnant to the Constitution should remain in force until April 1, 1892, unless sooner repealed by the Legislature.

The Court pointed out that the statute under consideration was obviously in conflict with the Constitution, but that any other part of the fundamental law bearing on the case must be taken into consideration. So that an unconstitutional law was to be continued in effect (by the law of the Constitution) until the time specified, that is, until repealed by the Legislature—which had not been done in this case—or until a specified date, April 1, 1892.

Summary. The question of exemption from taxation of corporations organized for pecuniary gain has given the Legislature and the Court a great deal of trouble, particularly the Court. The first case seemed to show that the Legislature might exempt such corporations; but if it did, the act would be unconstitutional! The Court, however, distinguished between "subjected" and "subject," holding that in the former it was discretionary with the Legislature, and in the latter, mandatory.

After having confirmed the principle set out above in a later case, the Court found it necessary to re-open the matter and reverse its former rulings. It was mandatory on the Legislature to tax corporations; and since on its face, the act of the Legislature provided for an irrepealable exemption, it must be declared void. If through error in the interpretation of the Constitution or law, property had escaped taxation, the Legislature had a right to require the payment of back taxes, and the innocent holder of such property must pay.

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[206]Miss. Laws 1876, c. 136, §§ 4-7, pp. 238-41.
[207]Murray v. Lehman, 61 Miss. 283 (1883).
[208]Miss. Const. (1869) Art. XII, § 20.
[209]Judah v. Brothers, 71 Miss. 414, 14 So. 455 (1893).
[210]Miss. Rev. Code (1880) § 531.
[211]§ 79.
[212]Miss. Const. (1890) Art. XV, § 274.

A correct interpretation of the constitutional provision with reference to taxation (Section 112) would not permit the Legislature to authorize exemptions on notes given in payment for property; nor would it allow the Legislature to deny a political subdivision the right to levy an ad valorem tax on banks in excess of the tax imposed by the State. There should be no discrimination between one kind of property and another. A docket fee imposed on one county was not a uniform tax.

Lastly, when under one Constitution a period of redemption was allowed on land sold for taxes and a sale was made immediately prior to the effective date of the subsequent Constitution which changed the period of redemption, the Court ruled that the statute should be upheld even though in conflict with the recently adopted Constitution. A saving clause was inserted in the latter Constitution for cases of this kind.

B. Special Legislation

The Constitution of 1890 contains a number of provisions concerning subjects which must be dealt with, if at all, through general laws.[213] Some of them have been violated. It is of interest that no analogous provisions are found in the three Constitutions[214] prior to the Constitution of 1890.

Railroads.

One railroad wanted to purchase part of a branch line of a competing and parallel railroad; but under the then existing laws it could not be done. So the Legislature passed a law to authorize it.[215] The Court pointed out that the Constitution forbade the Legislature to suspend the operation of any general law[216] for the benefit of any individual or private corporation.[217] The prohibition is absolute and unconditional and is not affected by that provision of the Constitution[218] that sets out the procedural steps, including a standing committee on local and private legislation, through which such local and private legislation shall pass.[219] Suspending a general law by special act is not similar to passing a "local and private" law; and following the procedure for the latter does not validate the former.[220]

Nor does the constitutional mandate to the Court apply to the type of statute herein declared unconstitutional. A provision of Section 89 reads: "If a bill is passed in conformity to the requirements hereof, other than such as are prohibited in the next section, the courts shall not, because of its local, special, or private nature, refuse to enforce it."[221] There is no

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[213] *See* §§ 80, 85, 87, 88, 89, 90 (a) through (u), 91, 100, 110, 178, 179, 181, 182, 192, 197.

[214] 1817, 1832, and 1869.

[215] Miss. Laws 1902, c. 89, p. 141.

[216] Miss. Code Ann. (1892) § 3560, as amended by Miss. Laws. 1898, c. 80, p. 95.

[217] Miss. Const. (1890) Art. IV, § 87.

[218] *Id.* § 89.

[219] Yazoo & M. V. R. R. v. Southern Ry. in Miss., 83 Miss. 746, 36 So. 74 (1903).

[220] *Id.* at 771-772, 36 So. at 78.

[221] Miss. Const. (1890) Art. IV, § 89. One other provision of the Constitution of 1890 may be said to affect judicial review of legislation. ". . . whenever an at-

restriction, however, on the courts in regard to an act to suspend the operation of a general law. Furthermore, this Act was violative of that provision of the Constitution[222] which prohibits the Legislature from passing any law for the benefit of an existing corporation, except upon condition that it should thereafter hold its charter and franchise subject to the provisions of the (present) Constitution.[223]

The Constitution requires, with certain exceptions and under specified provisions,[224] that all future railroads constructed in the State which pass within three miles of any county seat should be built through the same. As previously stated, the Constitution prohibits the Legislature from suspending the operation of any general law. By general law,[225] parallel or competing railroads were forbidden to consolidate, and other railroads were permitted to consolidate only upon the approval of the Railroad Commission of the State.[226] If a part of this statute[227] should be interpreted[228] so as to grant competing roads the right to consolidate, it would be violative of the Constitution.[229] And while pending litigation concerning the violation of statutes and orders was before the Court, the Legislature was not allowed to pass an act[230] which purported to confirm and make lawful the abandonment of part of a railway line in violation of an existing statute.[231] This would be a special act for the benefit of a particular corporation and under general laws[232] would palpably and manifestly violate the Constitution.[233]

The foregoing railroad cases were based on Article 87 of the Constitution of 1890. Two other cases invalidating legislation have been based on this same article.

The Court gave considerable attention to one of the cases.[234] The State Revenue Agent, relying on a number of sections of several statutes,[235]

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tempt is made to take private property for a use alleged to be public, the question whether the contemplated use be public shall be a judicial question, and, as such, determined without regard to legislative assertion that the use is public." *Id.* Art. III, § 17. These are the only two provisions found in any of the four Constitutions which apparently directly affect the Court's latitude in passing on void acts.

[222]Miss. Const. (1890) Art. VII, § 179.

[223]The appellant in the case, Yazoo & M. V. R. R. v. Southern Ry., cited *supra* note 219, was chartered under Miss. Laws 1882, c. 541, p. 838, its charter being perpetual; and it possessed many powers not enjoyed by a railroad incorporated under the Constitution of 1890.

[224]Miss. Const. (1890) Art. VII, § 187.

[225]Miss. Laws 1898, c. 80, p. 95.

[226]Miss. Code Ann. (1892) § 3587.

[227]*Id.* § 3599.

[228]State v. Mobile, J. & K. C. R. R., 86 Miss. 172, 35 So. 732 (1905).

[229]Miss. Const. (1890) Art. IV, § 87.

[230]Miss. Laws 1906, c. 143, p. 150.

[231]Mobile, J. & K. C. R. R. v. Mississippi, 89 Miss. 724, 41 So. 259 (1906); a related case cited *supra* note 228.

[232]Miss. Code Ann. (1892) § 3587; Miss. Laws 1898, c. 80, p. 95.

[233]Miss. Const. (1890) Art. IV, § 87.

[234]The Court sat *in banc* and rendered *per curiam* decisions: Miller v. Tucker, Miller v. Harding, 142 Miss. 146, 105 So. 774 (1925).

[235]*Id.* at 177, 105 So. at 777 for reference to those sections.

brought suit against appellees, members of the Board of Supervisors of one of the counties, on their bond to recover the amount of monies allegedly paid in violation of the law. A number of items were referred to as having been paid illegally. The Court confirmed a previous decision[236] to the effect that the Board were not liable on their bonds for an allowance made when the allowance was authorized by law, although the Board disregarded the provisions of the statute in making such allowance. It upheld the contention of the Revenue Agent, however, in that the Legislature could not by special act[237] make valid a prior act of the Board which paid out money not authorized by any existing legislation. When the Board paid out the county's funds to an object not authorized by law, a liability arose under a general law in force at the time.[238] An act purporting to alter this liability violated the Constitution in at least three particulars: first, the provision prohibiting special legislation and the suspension of a general law;[339] second, the provision prohibiting the payment of any contract not authorized by law;[240] and third, the provision prohibiting the Legislature from diminishing or extinguishing any liability or obligation of any person or corporation to the State or any of its political subdivisions.[241]

In the second case, a recent one,[242] the Sheriff of a county bought some supplies not authorized by the Board of Supervisors and later disallowed by said Board. The Sheriff paid for the supplies and later the Legislature sought to authorize the Board to reimburse the Sheriff.[243] Acting under this special law, the Board allowed the claim. Appellant, a member of the Board and a taxpayer, voted against the order and appealed to the Circuit Court, thence to the Supreme Court. The position of appellant was upheld by the Court, that it was a special act in contravention of the Constitution[244] since it suspended a general law[245] for the benefit of an individual.[246]

Municipalities.

Although the purpose of a special act might be a worthy one, the act must fall unless it meets the constitutional requirements. The Legislature sought to amend the charter of a municipality to allow it to set up a more

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[236]Paxton v. Baum, 59 Miss. 531 (1882). The case was decided, however, by an equally-divided Court, thus affirming in part the judgment of the lower court.
[237]Miss. Laws 1924, c. 704, p. 194.
[238]Miss. Code (1906) § 346; Miss. Code (Hemingway 1917) § 3719.
[239]Miss. Const. (1890) Art. IV, § 87.
[240]*Id.* § 96.
[241]Miss. Const. (1890) Art. IV, § 100.
[242]Beall v. Board of Sup'rs of Warren Co., 191 Miss. 470, 3 So. (2d) 839 (1941).
[243]Miss. Laws 1940, c. 586, p. 788.
[244]Miss. Const. (1890) Art. IV, § 87.
[245]Miss. Code Ann. (1930) § 6064.
[246]See Miller v. Tucker, 142 Miss. 146, 105 So. 774 (1925), cited *supra* note 234; Yazoo & M. V. R. R. v. Southern Ry., 83 Miss. 746, 36 So. 74 (1903), cited *supra* note 219. See particularly the opinion given the Legislature by Judge J. A. P. Campbell concerning the invalidity of the special act involved in the *Yazoo* case, 83 Miss. at 748-50, 36 So. at 75.

efficient police force.[247] The statute was held void.[248] The Constitution[249] and a general law[250] set out the procedure for amending city charters.

By a ruling of the Court, if two municipalities desire to consolidate and pursuant to law[251] pass ordinances to that effect, the ordinances are not valid if a third municipality has part of its territory taken against its desires. Subsequent acts of the Legislature[252] which sought to validate such ordinances were unconstitutional[253] in that they attempted to amend a charter of a municipality by a local act, an act applicable only to the special condition existing in one municipality. The Court has refused to give its approval to the passage by the Legislature of local acts to amend charters of municipalities while the Constitution retains its present provision with reference to them.[254]

Enumerated Prohibitions.

Section 90 of the Constitution (1890) specifies twenty-one subjects concerning which the Legislature shall not pass local, private, or special laws. Eleven cases involving unconstitutional legislation were decided by the Court based on this section.

In order, no doubt, to make the position of fireman more attractive in one of the municipalities, the Legislature passed an act applicable to only one town exempting the members of the fire department from road duty.[255] The Court held that the Constitution[256] repealed laws, the passage of which was prohibited by it.[257] The Court rejected the argument that repeals by implication were not favored, as well as the apparently ingenious one based on the parenthetical provision in the section of the Constitution under discussion.[258] The argument was that this clause did not declare that no one should be exempt from the duties referred to, but only that no one should be exempted—meaning that no one should claim exemption by reason of any special or local law thereafter enacted. This would make the clause superfluous. Furthermore, one was not exempt unless "exempted" by the law, and that was precisely what the Constitution forbade.[259]

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[247]Miss. Laws 1900, c. 134, pp. 173-176.
[248]Thompson v. State, Monette v. State, 91 Miss. 662, 44 So. 989 (1907).
[249]Miss. Const. (1890) Art. IV, § 88.
[250]Miss. Code Ann. (1892) § 3039, as amended by Miss. Laws 1900, c. 69, p. 79.
[251]Miss. Code (1906) § 3301 (formerly Miss. Laws 1902, c. 103).
[252]Miss. Laws 1912, c. 393, p. 441; Miss. Laws 1926, c. 505, p. 89.
[253]They violate Miss. Const. (1890) Art. IV, § 88.
[254]City of Pascagoula v. Krebs, 151 Miss. 676, 118 So. 286 (1928).
[255]Miss. Laws 1886, c. 458, p. 820.
[256]Miss. Const. (1890) Art. IV, § 90, ¶ (k).
[257]Chidsey v. Town of Scranton, 70 Miss. 449, 12 So. 545 (1892).
[258]Miss. Const. (1890) Art. IV, § 90, ¶ (k), which exempts any person from jury, road or other civil duty (no person shall be exempted therefrom by force of any local or private law).
[259]Chidsey v. Town of Scranton, 70 Miss. 452, 12 So. 545 (1892).

The Legislature could not pass a law[260] applicable to a single county which provided that no person should be liable to jury service outside the district in which he lived.[261] The Legislature placed this provision in an act dividing a county into two judicial districts. The case arose on a motion to quash the special venire because it had been drawn from both judicial districts. The court below followed the general law relative to jury service,[262] and not the law referred to above. That was proper. Any other course would have interpreted the legislative intent as desiring to pass a local or special law by engrafting an exception on a general law, and thus violating the Constitution.[263] The constitutional provision was designed to prevent such an incongruous condition of affairs.

The framers of the Constitution wanted to be doubly sure that lands belonging to or under the control of the State should be protected from possible legislative profligacy.[264] Consequently the Court was able to say without apparent hesitation that any act[265] which sought to convey State-purchased tax sale land back to those who formerly owned it on payment of a small patent fee, was certainly unconstitutional.[266] That was a special act granting lands under the control of the State to private individuals. But even though it were not invalid on that basis, it further violated the constitutional provision which prohibits donations of lands belonging to or under the control of the State.[267] The idea underlying the provisions of the Constitution under consideration is that the whole public shall have the right to share in acquiring any public lands.

By a special act[268] the Legislature sought to create a special drainage district to be administered by a commission with authority to improve and shorten "all natural drains." Such authority was necessary if the purpose of the act were carried out, i. e., to provide adequate drainage by artificial drains. The Court held that control over such natural drains meant control over water courses, and, therefore, it was unconstitutional[269] in that it violated that provision[270] prohibiting the Legislature from passing a special act "relating to stock laws, water courses, and fences." In view of the fact that the whole purpose of the act depended on one feature and that that feature was invalid, the whole act must fall.[271]

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[260]Miss. Laws 1892, c. 116, §§ 1, 9, pp. 392-93.

[261]Burt v. State, 86 Miss. 280, 38 So. 233 (1905).

[262]Miss. Code Ann. (1892) § 2363, as amended by Miss. Laws 1904, c. 151, p. 208.

[263]Miss. Const. (1890) Art. IV, § 90, ¶ (n)—selecting, drawing, summoning, or empaneling grand or petit juries.

[264]See Miss. Const. (1890) Art. IV, § 90, ¶ (u).

[265]Miss. Laws 1908, c. 121, p. 130.

[266]Winton v. Day, 96 Miss. 1, 49 So. 264 (1909).

[267]Miss. Const. (1890) Art. IV, § 95.

[268]Miss. Laws 1910, c. 183, pp. 172-91.

[269]Belzoni Drainage Comm. v. Winn, 98 Miss. 359, 53 So. 778 (1910).

[270]Miss. Const. (1890) Art. IV, § 90, ¶ (q).

[271]See Crenshaw v. State, 101 Miss. 457, 58 So. 219 (1911), invalidating Miss. Laws 1908, c. 147, pp. 147-67. See also Ferris v. Wellborn, 64 Miss. 29, 8 So. 165 (1886), discussing the meaning of "water courses."

The Constitution prohibits the passing of a special, local, or private act regulating the rate of interest on money.[272] The Legislature passed an act[273] providing for the organization and regulation of building and loan associations. Among other things, the act set out that the money borrowed from such associations should be paid back in monthly installments over a period of not less than two years at a rate of interest not to exceed ten per centum. The security for the loan was to be real estate.

On original hearing, the Court invalidated this act.[274] The Court held that the act, stripped of details, was an effort to confer special immunities and privileges on certain defined associations engaged in the ordinary business of loaning money. The rate of interest was fixed by general law and it was not within the power of the Legislature to exempt by special act such associations under the guise of a purely imaginary special classification.[275] On suggestion of error, however, the Court overruled its prior decision and upheld the act.[276] It said that building and loan associations were different from ordinary money lenders; and that their right to collect a greater interest rate than that which the general law authorized depended on three conditions not imposed on ordinary loans of money, viz., (1) that the security be real estate; (2) that the loans not be payable in less than two years; and (3) that loans be paid in equal monthly installments.[277] The Court with commendable frankness pointed out that its former view on the matter was entirely too narrow.

The last case arising under the topic of *Enumerated Prohibitions* involved the constitutionality of an act[278] which sought to provide greater compensation for prosecuting attorneys in certain very limited classes of counties.[279] In the case at bar, the act applied to counties having "assessed valuation of twenty-five million dollars or more," and being "in a levee district, where a cotton tax is imposed for levee purposes." To pay greater compensation in that type of county than in other counties having the same valuation would constitute a local law, which is in violation of the Constitution.[280] It was an unreasonable and arbitrary classification.[281] The payment of a cotton tax was not a reasonable basis for a classification which involved the payment of salaries of officers whose prime duty was to prosecute crime.

"We are deeply sensible of the responsibility resting upon a

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[272]Miss. Const. (1890) Art. IV, § 90, ¶ (d).
[273]Miss. Laws 1912, c. 167, § 9, p. 178.
[274]Halsell v. Merchants Union Ins. Co., 105 Miss. 268, 62 So. 235 (1913).
[275]*Id.* at 279-80, 62 So. at 236.
[276]*Id.* at 280-282, 62 So. at 645.
[277]*Id.* at 282, 62 So. at 646.
[278]Miss. Laws 1924, c. 211, §§ 1-4, pp. 309-10.
[279]Toombs v. Sharkey, 140 Miss. 676, 106 So. 273 (1925).
[280]Miss. Const. (1890) Art. IV, § 90, ¶ (o).
[281]The Court cited with approval and quoted from 25 R. C. L. 815 § 66. See Toombs v. Sharkey, 140 Miss. 676, 692, 106 So. 273, 275 (1925), concerning the distinction between general and special laws.

court when it strikes down a statute enacted by the Legislature . . . , but we cannot bring ourselves to sanction a classification which is not based upon any substantial distinction making the class really different from any other."[282]

Summary. Special legislation, as the name implies, is legislation passed for some special person who needs or desires something that the general public does not have. Legislation of this type probably has been needed in many cases; but abuses arose, and for this reason the framers of the present Constitution indicated in a number of sections that such legislation was forbidden.

The absolute and unconditional limitations on passing special or local laws are those which prevent their being used to suspend the operation of a general law for the benefit of any individual or private corporation or association, and those which prevent their being used in a number of constitutionally enumerated prohibitions. Such laws, however, may be passed conditionally. Stating the matter negatively (as the Constitution does), special or local laws shall not be passed for the benefit of individuals or corporations on condition that a general law has been or can be provided, or that the court can give relief, or that a general law is applicable and advantageous. A further condition is that they must conform to certain procedural requirements.[283]

V. Conclusion

Judicial review is a worthwhile contribution to good government. Attention will be turned to a justification of this statement. It may be said that the inclusion of certain cases in this study occasionally involved a matter of judgment. For this reason an investigation by another person might develop somewhat different totals in the summary of cases. If the unconstitutionality of an act or any section thereof has been implied, the case is counted.

During the first of the four constitutional periods, the Court, by count of reported decisions, decided 394 cases. It is well to keep in mind that all decisions of the Court are not reported. Two of the reported cases involved unconstitutional acts of the Legislature. During the second period, the Court decided 20 cases involving unconstitutional acts of the Legislature; in the third period, 40; and in the fourth period, 106. This is a total of 168 cases.

The constitutional period of 1832 is interesting. The High Court of Errors and Appeals (the Supreme Court) consisted of three judges elected from districts by electors without property qualifications and with a short

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[282]Toombs v. Sharkey, 140 Miss. 676, 697, 106 So. 273, 276 (1925), cited *supra* note 279.

[283]*Cf.* Miss. Const. (1890) Art. IV, §§ 87, 88, 89, 90; Yazoo & M. V. R. R. v. Southern Ry. in Miss., 83 Miss. 746, 36 So. 74 (1903).

residence requirement. Nor were there any property qualifications for members of the Legislature. With these facts in mind—a democratic electorate electing a democratic legislature and a presumably democratic judiciary—we find the latter group apparently holding a tight reign on the Legislature as it infringed on property rights. Twenty cases invalidated legislation.

The 20 cases invalidated 20 acts which affected 12 provisions of the Constitution for a total of 27 different violations. Of the 27 violations, 24 were based on the Bill of Rights, with 19 of the latter number concerning property rights. The following figures are of interest:

Constitution of 1832: 20 Cases

Bill of Rights				Other Provisions	
Personal		Property			
limited tenure	1	contracts	6	judiciary	2
due process	2	just compensation	5	separation of powers	1
open courts	2	open courts	3		
		due process	2		
		jury trial	2		
		no exclusive privilege	1		
Totals	5		19		3

Another table may be worthwhile. When was the law passed and how long was it before the Court invalidated it?

Constitution of 1832: 20 Cases

Law	Decision	Law	Decision
1822	1834	1850	1860
1822	1848	1852	1857
1825	1847	1852	1858
1836	1847	1857	1864
1837	1839	1861	1879
1842	1843	1865	1866
1843	1846	1865	1866
1846	1847	1865	1874
1848	1850	1867	1867
1850	1852	1868	1873

The table is not meant to imply that the Supreme Court has full control over the period of time between the passing of the law and the rendering of the decision. The law must affect somebody and that person must be willing to "go to law" about it. And it takes more than willingness to get the job done.

The Constitutional period beginning in 1869 has been referred to a

number of times in the development of this subject. That was the period in which the people rejected the Constitution when it was first submitted in 1868 and after the elimination of the objectionable features, ratified it in 1869. These features may be found in Poore's compilation.

The Supreme Court consisted of three judges appointed from districts by the Governor with Senate confirmation. It will be recalled that under the Constitution of 1817, the judges were appointed by the Governor without Senate confirmation to serve during good behavior. In 1832, the office was made elective; but under the Constitution of 1869, the appointive system was revived with confirmation by the Senate required. The conditions of the period were too "democratic" to permit selection of the judges by popular vote. Suffrage qualifications were exceedingly liberal and it would not have done to risk electing the judiciary. The elective judiciary under the constitutional period of 1832 seemed to be conservative enough; but conditions were too abnormal in 1869.

The forty cases considered under this constitutional period invalidated 43 acts of the Legislature affecting 18 provisions of the Constitution for a total of 52 different violations. The impairment of the obligation of contracts (9) leads the list with taxation (8) running a close second. See the following table:

Constitution of 1869: 40 Cases

Bill of Rights				Other provisions	
Personal		Property			
public office	3	contracts	9	taxation	8
due process	1	just compensation	3	schools	5
ex post facto	1	due process	3	corporations	3
criminal prosecution	1	open court	1	rebellion	3
				courts	3
				assessment	2
				separation of powers	2
				board of supervisors	2
				legal procedure	1
				governor's powers	1
Totals	6		16		30

Although the Bill of Rights is not overwhelmingly involved in this period as in the period just preceding, it represents nearly half of the provisions, with the greater number of these based on property rights again. It seems that it is the person with money who is able to get a case into the courts. The majority of the provisions other than those under the Bill of Rights seem to confirm this statement. It is recalled that the Court made the statement in one decision that there are possibly a number of laws that are unconstitutional but that they never get to the Court. If judicial re-

view is a good thing, then those who are economically able to test the law should be commended. Certainly they render a service to good government.

Again, when was the law passed and when was it decided? The following compilation answers this question:

Law	Decision	Law	Decision	Law	Decision
1861	1875	1873	1874	1882	1883
1863	1875	1873	1874	1882	1883
1866	1876	1873	1874	1884	1885
1870	1899	1875	1877	1884	1886
1870	1902	1875	1887	1875–76–84	1899
1871	1874	1876	1877	1884	1903
1871	1875	1876	1883	1885	1892
1871	1876	1876	1883	1882–86	1886
1871	1911	1876	1886	1886	1887
1872	1873	1877	1877	1888	1888
1872	1875	1877	1878	1888	1889
1872	1874	1878	1879	1888	1900
1872	1874	1882	1882	1888	1904
				1888	1904

It is obvious that the Legislatures of 1871 and 1872 were dominated by people in Mississippi other than those used to governing. It is just as obvious that the Legislature of 1888 was in the hands of those who had been previously ousted but had come back into power.

The Court was fairly busy throughout the period. In its session of 1874 it was particularly busy on unconstitutional laws. The Court (consisting of Peyton, C.J., and Simrall and Tarbell, J.J.) invalidated five acts. Two have been referred to. They were: the act seeking to eliminate personal notice in suits to foreclose on land, and the one to allow jurors who were partial to serve. Of the other three, one had to do with an act which was passed with so many mistakes and inaccuracies that it was unintelligible; one denied an official his alleged privilege to continue in office indefinitely; and one held that the Governor could not sign a bill after the Legislature adjourned.

One is impressed with the value of judicial review of legislation in times of emergency. And because of the wisdom of the Court in the development and application of sensible rules of constitutional construction, in normal times, judicial review serves efficaciously.

The Constitution of 1890 was the only one of the four Constitutions not submitted to the people for approval. The Supeme Court held that such submission and ratification by the people was unnecessary for its validity. The Convention represented the sovereignty of the State, and

the only limitation on its powers was that it make no change in the form of government.

The Supreme Court continued to be appointive until 1916; at that time, the number of judges was increased from three to six. In general, the qualifications of the electorate were made conservative. The purpose of the framers of the Constitution was accomplished in eliminating the negro from political participation. The use of the "understanding clause" assisted in accomplishing this. It is difficult to draw any conclusions as to whether a conservative electorate has elected a Legislature which would not pass many unconstitutional laws. Statistics have not been compiled for such a conclusion. It seems that the number of unconstitutional laws is comparatively the same.

Here are the figures: From the adoption of the Constitution to the present, 106 cases have involved unconstitutional legislation. These cases dealt with a like number of acts of the legislature (twice a case involved two acts; twice two cases dealt with the same act). Of this number, however, there are some half dozen acts which the court saved by deciding that Legislature did not mean what it seemed to mean! There have been around 100 cases in which the Court has, in whole or in part, invalidated acts of the Legislature. This invalidation dealt with 31 provisions of the Constitution for a total of 125 different violations.[284]

Private rights apparently are becoming more secure. In general, this may be accounted for in two ways. The State is growing more politically mature and the Fourteenth Amendment to the Federal Constitution acts as a curb on possible hasty legislation. Naturally, there is a certain amount of

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[284]Constitution of 1890: 106 cases

Bill of Rights				Other Provisions	
Personal		Property		special legislation	19
Criminal		contracts	9	judiciary	11
procedure	7	due process	7	taxation	10
due process	4	open courts	2	electorate	6
searches		jury	1	compensation, officers	6
ex post facto	1	debts	1	governor's powers	5
jury	1			legislative procedure	4
				board of supervisors	4
				corporations	4
				schools	3
				amendments	3
				local government	2
				redemption, land	2
				separation of powers	2
				servitude	2
				elections	2
				obligation to state	1
				removal	1
				assessment	1
				donating land	1
				general power	1
Totals	15		20		90

pride in all public agencies that their work should not be condemned too severely, particularly by outsiders.

Special legislation has had to be watched by the Legislature, for acts involving it have conflicted with one of the provisions nineteen different times. The Constitution has a number of provisions prohibiting legislation of this kind. Some of these constitutional provisions are stated in general terms and some are stated in specific enumerated prohibitions. The constitutional statement, in general terms, is that no special law shall be passed in cases which can be provided for by general law or when relief can be given by the court. This gives the Legislature a latitude. Again, the court is prohibited from enforcing a special law if it has passed through a particularly prescribed procedure of legislative enactment. This procedure, however, is not applicable to the goodly number of enumerated prohibitions, nor is it applicable, so the Court has ruled, to the passing of a special law which attempts to supersede a general law.

Of the eleven provisions affecting the judiciary, seven concerned the Supreme Court. The subjects involved had to do with judicial power, jurisdiction, and rules of procedure of the Court. From the standpoint of administrative law, one act sought to permit appeals from a public service commission.

The section of the Constitution concerning taxation has given the Legislature a great deal of trouble. Property must be assessed under general laws at its true value; taxes must be levied in proportion to the value of the property; and all taxes are to be equal and uniform. Violations of this provision rank third. These acts affected such businesses as banks, lumber mills, foreign corporations, and railroads. Students of taxation have urged a constitutional amendment to permit the Legislature to classify property for purposes of taxation; but it seems that no great amount of interest has been developed in the State concerning the change.

Have the people since 1890 been more eager to get acts tested without too great delay? Or to get acts tested at all? Has any particular Legislature passed an unusually large number of void acts? Or has any one term of the Court had more unconstitutional legislation to deal with, comparatively considered, than another? The compilation in the footnotes will, in a measure, answer these questions.[285]

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Passed	Decided	Passed	Decided	Passed	Decided
1880	1893	1908	1910	1922	1926
1880	1893	1908	1911	1922	1927
1886	1892	1908	1913	1924 (4)	1925 (4)
1892 (5)	1893 (5)	1908	1916	1924 (2)	1926 (2)
1892	1894	1908	1921	1924	1932
1892 (2)	1894 (2)	1910	1910	1926 (2)	1926 (2)
1892	1902	1912	1912	1926	1929
1892 (3)	1905 (3)	1912 (4)	1913 (4)	1927 (2)	1927 (2)
1894	1898	1912 (3)	1916 (3)	1928	1928

In general in the constitutional period of 1890, laws have been tested much sooner after their passage than in the preceding periods. However, it took twenty-three years to get one law out of the way (1906-1929). It is quite interesting to note that the first Legislature which met after the adoption of the Constitution passed twelve unconstitutional laws which were decided by the Court within a period of twelve years. Three of these cases affected jury service and two dealt with qualifications for voting.

The Legislatures of 1906 and 1908 (different personnel) did not do so badly! The former enacted eight void acts, and the latter, seven. However, the Legislature of 1912 ran the first Legislature (1892) a close race. It passed eleven unconstitutional laws. One of those laws may be designated "if" in that the Court held that if two provisions were void, the balance of the act would stand. The law upheld, in general, the commission form of government for municipalities. Four of the ten laws were invalidated because of their being special, two of that number dealing with schools, one with a municipality, and one with interest on money. Three others dealt with taxation, two with due process, and one with impairing the obligation of contracts. Judicial review is still necessary. As a general rule the Legislature does not intend to pass invalid acts; but intentions are not to be considered when passing on the validity of an act which is in contravention of the fundamental law.

By consolidating similar provisions of the Constitutions violated and by eliminating three duplicate provisions (open courts, due process, and jury in the Bill of Rights), we find that the 168 cases invalidated 171 acts

Passed	Decided	Passed	Decided	Passed	Decided
1898	1899	1912	1917	1928	1929
1898	1900	1912	1920	1928	1930
1898	1902	1912	1928	1928 (2)	1931 (2)
1898	1907	1914	1920	1928	1939
1900	1904	1914	1922	1930	1932
1900	1907	1916 (4)	1916 (4)	1930	1933
1902	1903	1916	1920	1930	1934
1904 (2)	1906 (2)	1916	1922	1930	1939
1906	1906	1918	1920	1931	1934
1906	1907	1918	1921	1932 (3)	1934 (3)
1906	1908	1920	1922	1934	1940
1906	1911	1920	1923	1935	1936
1906	1912	1920	1924	1935	1938
1906	1916	1920	1926	1938	1939
1906	1917	1920	1927	1938	1940
1906	1929	1920-22	1926	1940	1941
1908	1909	1922	1922		
1908	1910	1922 (3)	1923 (3)		

of the Legislature affecting 33 different provisions of the Constitutions for a total of 206 violations.[286]

This covers a constitutional survey of 126 years. In comparison with the number of cases of the United States Supreme Court which invalidated acts of Congress, the record of the State is a little more imposing from the standpoint of numbers. Judged by the probable total number of laws passed during this period of time, the number of acts held unconstitutional is not excessive.

It is true that some of those acts would not have affected very vitally the course of events in the State. It is just as true that a number of the acts, if allowed to stand, would have altered very materially the course of events. It is believed that the order in which the provisions fall, based on the number of times violated, indicates to a marked extent the comparative value of the constitutional provisions to the political and legal integrity of the State.

The first impression received by a study of the cases involving unconstitutional legislation in Mississippi is that, after all, judicial review is not as important as one has been led to believe. Would not affairs have got along about as well without such a principle? Then, reflection on the principles involved in the application of judicial review tends to cause one to recognize its merit. The principle of judical review of state legislation is a stablizing application of the basic elements of political life.

The term, judicial review, should be defined as the principle developed in the jurisprudence of many states possessing written constitutions, which

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Bill of Rights			
Personal		Property	
Provisions	Times Violated	Provisions	Times Violated
criminal procedure	8	obligations of contracts	25
due process	7	due process	12
public office	3	just compensation	8
open courts	2	open courts	6
ex post facto	2	jury trials	3
searches, seizures	2	no exclusive privilege	1
limited tenure, office	1	debts	1
jury trial	1		
8	26		56
Other Provisions			
special legislation	19	assessments	3
taxation	18	land	3
judiciary	17	rebellion	3
schools	8	elections	2
corporations	7	local government	2
board of supervisors	6	servitude	2
compensation, officers	6	general powers	1
electorate	6	obligations to State	1
governor's powers	6	removal of officers	1
separation of powers	5	21	124
legislative procedure	5		
amendments	3		

places on the courts the duty of declaring laws consistent or not with the fundamental written law of the state. It is believed that the lawyer looks on the term as embodying a much broader concept. There can be judicial review of any action arising under judicial cognizance, according to his opinion. But to the political scientist, the term is applied altogether to the principle set out above. Does an act of the Legislature when laid alongside the Constitution fit into the permissible plan of constitutional architecture? If it does, it is constitutional; if it does not, it is unconstitutional and, therefore, void.

Those who would uphold the principle of judical review, particularly those who look on it as the very life itself of orderliness, must keep in mind that it, too, is a political matter. Although politics may not be law, law is always politics. Judicial review has served and will continue to serve as a compromise between the past and the future for the benefit of the present; and although neither the past nor the future can be disregarded safely, in politics the present weighs heavily. In the ability of the Court to recognize the political implications of the principle of judicial review rests the opportunity to render great service to the people. Apparently the judges of Mississippi have been diligent in the application of this idea. They have not been arbitrary or capricious; they have not flaunted their erudition before a hapless people. From the beginning, the Court of the State has been very careful to accept the principle of separation of powers, to allow and to urge the Legislature to accept and conform to its responsibilities; and the Court has granted to itself the very important working formula that intentions have been honest and that infallibility is unobtainable.

Law is not a spontaneous eruption, but a gradual refinement. It is in the refining process, which is often imperceptible to the layman, that the Court must play its part. It must accept the Constitution as written, guard it jealously, and exert all possible influence on the people and their representatives to accept it as the groundwork for all political progress. When the members of the Legislature, fresh from a campaign, think the people desire something, they believe that it is their duty to pass a law. Not everything the people want or think they want at a given time is law; neither is every act passed by the Legislature a law. Judicial review justifies itself by harmonizing legislative enactments with the fundamental law of the Constitution.

This country bases its governmental system on a written Constitution. Constitutions are written so that, as far as possible, the rules by which the game is to be played may be known in advance. Fundamental modification of these rules should never be made while the game is in progress nor should it be made except by those who set them up in the beginning. It may be true that the greater political experience a people has, the less need there is for an elaborate set of rules. But one is not yet justified in arriving at the conclusion, certainly so far as we are concerned, that these written rules should be disregarded and that the rules be made by those

who are immediately playing the game. The rules must be interpreted. Their initial interpretation or expansion may be made by the Legislature; but if it "guesses" wrong, there is no arbiter to which an appeal can be carried more safely than the body which spends its life searching for valid expression of the meaning of the rules.

Democracy is not placid, nor can it be. Proponents of this way of life recognize the selfishness of groups and of individuals. Democracy has its faults; its transcendent virtue, however, is that its motives are good. It has for its purpose the attainment of the highest possible individual and group development within the area of its influence. The ultimate aim of democracy coincides with the ultimate aims of those who are a part of it. Because the weaknesses of those who live under the system are often revealed in the system itself, there must be impressed on the people the fundamental truth that violence destroys. Violence destroys just as quickly and more insidiously when clothed in the garment of law. The rights of all must be protected and the rights of every kind must be guarded. It is but sensible that where turgidity exists, a refining process be used. Judicial review justifies itself to the extent that the Court is able to impress the people with the dangers latent in the democratic process.

This is not to imply a eulogy of judicial review. It is not to say that the Supreme Court is the salvation of the State. It is to say that the people, earnest in their desire to form their own written law and live under that law, can feel more secure because of the application of judicial review to legislation.

SENATOR PAT HARRISON: A PERSONALITY SKETCH

*George C. Osborn**

One snowy afternoon in 1917 two men were sitting in the Senate Office Building in Washington discussing a brilliant speech made that day in the House of Representatives by a young man from Mississippi. Suddenly Fred Sullens turned to the legislative veteran John Sharp Williams and asked:

"Senator, what is your candid estimate of Pat Harrison? Does he possess real ability, or is he merely another clever showman on the floor of the House? Will he go higher in public life?"

Williams gazed out of the window at the fast-falling snow for a few moments and meditatively replied:

"Fred, I believe Pat is going much higher in public life. He should. He has many good and enduring qualities to carry him onward and upward. He is frank, sincere, honest and courageous. He has a pleasing personality, is an attractive and convincing speaker, and the attention he is attracting in the House is not all showmanship. But most important of all things, Pat has something few youngsters in Congress possess. He has intellectual humility. He is mentally modest. . . . Yes, Fred, Pat Harrison is going a long way in public life."[1]

For several years before he retired from the Senate in 1923, John Sharp Williams tutored Harrison, doing much to insure the young man's success. Pat came to the Senate after defeating Senator James K. Vardaman in a hard fought contest in 1918. Williams immediately began to do everything he could to help his new colleague, securing his appointment to the important Senatorial committees of Finance and Foreign Relations, and turning over to him nearly all matters of patronage "so that you can avail yourself of things in such a way as to help your future."[2] Harrison was invited to assume the retiring statesman's desk even before the closing of Williams' term. The desk had great sentimental value because it had been occupied by Mississippi's greatest senators since the days of Jefferson Davis.[3]

It is doubtful if even John Sharp Williams with his faith in Harrison's

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[1]Jackson, Miss. Daily News, June 23, 1941 (editorial by Fred Sullens commemorating the death of Harrison).

[2]HARRISON PAPERS (John Sharp Williams to Pat Harrison, Jan. 4, 1923). The HARRISON PAPERS, as cited in this article, refer to about 30,000 unprinted original manuscripts, letters, speeches, and memoranda of the late Senator Harrison, in the Harrison Room of the University of Mississippi Library.

[3]OSBORN, JOHN SHARP WILLIAMS: PLANTER-STATESMAN OF THE DEEP SOUTH (1943) 456.

future realized just how far his young friend would go. How could he have foreseen the time when Harrison would be known all over the United States? At the time of his death in 1941 he was chairman of the all-powerful Finance Committee, vice-chairman of the Foreign Relations Committee, a member of the Rules Committee, and President *pro tempore* of the Senate itself. That he was one of the ablest men in the Senate, one of the chief voices in the councils of the government and in the Democratic party few will question.[4]

Harrison had indeed come a long way. He was born at Crystal Springs, Mississippi, in 1881, the son of a storekeeper. His father died when Pat was a very small boy and he joined his two older brothers in helping to make a living for the family. One of his earliest ventures was selling newspapers on the streets of Crystal Springs and the lusty voice he developed at the job stood him in good stead all his life. As he grew older he became proficient with a baseball, a skill which helped him to remain at his studies for two years at Louisiana State University. After leaving the University he secured a teaching position at Leakesville, Mississippi. Here two important things happened to him—he married the beautiful Mary Edwina McInnis, and through diligently studying law at night he passed the state bar examination. In 1905 he became one of the youngest district attorneys ever to serve in Mississippi. In 1910 he resigned from this position to become a candidate for membership in the National House of Representatives. He was elected and when he was only twenty-nine years of age began his career in Washington; a career which terminated with his death more than thirty years later.[5]

During the eight years Harrison served in the House of Representatives, his career did not give full promise of the leadership he was to attain in the Senate. He was a member of several committees but was so far down the seniority line that he had little chance to impress his colleagues with his qualities as a leader. He did make a name for himself as an excellent speaker and as a jolly good companion.[6] In fact, he gave many people the impression that he was just a clever showman with a flair for friendship and that he would never attain real stature as a statesman. He seemed a happy, care-free sort of person who did not take himself too seriously and who spoke with wit and sarcasm even in the midst of the most heated debates.[7]

Harrison developed greatly as a politician and Democratic leader after he reached the Senate. He worked hard at the job of studying governmental affairs and in 1932 when the Roosevelt landslide put him in the very top-ranks of the Democratic party he was ready for the job. However,

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[4]Carlisle Bergeron, *Old Man River*, N. Y. Herald Tribune, March 30, 1941.
[5]From biographical data in the HARRISON PAPERS.
[6]N. Y. Herald Tribune, March 30, 1941.
[7]Jackson, Miss. Daily News, June 23, 1941.

in this sketch I would like to reveal something of Harrison, the man, and the qualities that made him lovable and human.

Simplicity was one of Pat Harrison's outstanding characteristics. Everybody called him "Pat"; very few gave him the dignified title "Senator."[8] At the end of the day he enjoyed calling the members of his office staff to talk and joke with them. All were free to express opinions in unstinted fashion.[9] The Senator did not enjoy large social functions which required formal dress. He preferred to relax at a "sad" movie and it was not unusual for him on these occasions to shed a few tears.[10] Baseball and, later, golf were his favorite sports. His participation in the latter was often made much of in his campaigns in Mississippi. After all, the farmers of his home state did not play golf and were told that the game was only for the wealthy urban aristocrats. His opponents, however, had a hard time convincing the voters that "our Pat" had gone "highbrow" when after every speech he made to them they could shake his hand and find him just as genial and friendly as always.[11]

Once during a radio speech from Washington Harrison gave the "nye" and "eye" pronunciations to the words "neither" and "either." Not many people pronounce them that way in Mississippi and he received several letters from his constituents protesting such "up-country goings on." Immediately, he lapsed into the enunciation of the words to which most of his people were accustomed.[12]

In 1926 Will Rogers poked fun at the New York politicians who had to be coached for two weeks on how to greet some visiting celebrity. When the great day came they were dressed alike and talked as much alike as twins. Rogers was prompted to remark that "Americans are getting like Ford cars—they all have the same parts, the same upholstering, and all make exactly the same noises."[13] The famous humorist concluded his press interview with: "Yours for Pat Harrison for President; Pat is at home with anybody without being coached."[14]

Many of Harrison's friends seconded the nomination. In fact, there were many times when more or less extensive talk was done about his possibilities for either the Democratic Presidential or Vice-Presidential nominations. On all such occasions Pat replied with his Southern drawl: "While I may personally feel the party would show fine judgment in such a selection, I've never let the Presidential bee sting me, and I hope to God I never will!"[15]

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[8]*Ibid.*

[9]HARRISON PAPERS (1940) (memoranda by Miss Catherine Blanton, Senator Harrison's secretary).

[10]N. Y. Herald Tribune, March 30, 1941.

[11]Jackson, Miss. Daily News, June 23, 1941.

[12]See several letters in HARRISON PAPERS.

[13]Washington Post, Oct. 24, 1926.

[14]*Ibid.*

[15]HARRISON PAPERS (1940) (Harrison to E. J. Gilmore, April 9, 1940). See

Senator Harrison "has a barbed-arrow mind. Republicans fear his satire perhaps more than they fear the speech of any other Democrat. Harrison is not an intellectual giant. But he has an inimitable way like thorns have, of getting under the skin." So wrote a Southern editor in the summer of 1930 when Harrison was up for re-election but without opposition.[16] Harrison assumed more than his full share of the job of harassing the political enemy. The amazing thing was that he was as well loved by those on whom he practiced his sarcasm as by his Democratic colleagues. He had "a sharp tongue, honey-flavored."[17]

Some of Pat's most famous exchanges of excoriation were with Senator James E. Watson of Indiana, although the seeming bitterness was of words only. One day when Jim Watson was speaking on some project of his party he drew from Harrison a lengthy denunciation of the program, the Republicans and even of Watson himself. As the Mississippian finished his speech, he walked over to this friendly foe and drawled:

"Jim, ain't I the worst demagogue you ever heard?"

"No, Pat, I am," Watson replied with a grin.[18]

On one occasion he declared that he spent about half of his time telling his Republican friends in the Senate what to do. "They always do just the opposite thing. That is why they are always in trouble."[19] In 1930 when the Republican Senators were hopelessly divided over what to do about the deepening depression, Harrison remarked that it was "a peculiar coincidence that in the Senate of the United States, there were ninety-six members, 39 Democrats and 57 varieties."[20]

As a Southerner and a Democrat it was perhaps inevitable that some of Harrison's sharpest thrusts at his political enemies were over the tariff. In 1929, just as the most severe depression of the twentieth century was rounding the proverbial corner, the Mississippian harangued at length on the need for lowering instead of raising duties as provided for in the pending Smoot bill. During this plea for downward revision, a few of the articles involved were singled out for special criticism:

"Boots and shoes. There are men in this country today who have so many children that it costs them as much money to buy shoes for them as it does to send them to school, and yet the committee proposes to put a duty on shoes and boots. That will help the American farmer.

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also the many letters in these papers from constituents and out-of-state friends backing Harrison for possible nominations.

[16]Birmingham, Ala. News, June 27, 1930.

[17]Boston Herald, Dec. 12, 1926.

[18]John C. Henry, *Ole Mississippi's Pat Harrison*, Washington Sunday Star, April 24, 1938.

[19]Harrison Papers (1940) (speech before the Advertising Federation of America, May 20, 1930).

[20]*Ibid.*

"Harness. The farmer will welcome a duty on harness, will he not? Do the members of the committee not think it is sometimes necessary for the farmers to use harness?

"Toys for little children. Those did not escape the attention of the committee. They did not think of the little fellow who, as Christmas time approaches, writes his little letter to Santa Claus asking for a toy. The committee put an increased duty on toys for little children.

"Toothbrushes. It is proposed to discourage people from keeping their teeth clean by imposing a high duty on toothbrushes.

"Pipes. The Senator from Utah some time ago wanted to prevent people smoking cigarettes, and now he does not want them to use pipes. He does not want the old fellow back in the forks of the creek, who is not making much and needs a pipe at evening time, when he is tired from his day's labor, to enjoy himself with a smoke. The majority of the committee are going to make him pay more for his pipes.

"Matches. It is even proposed to make the man who strikes a match to light his pipe or cigarette pay more for the match which is needed. Through the tariff the Senator from Utah wants to punish people who smoke pipes or cigarettes and who have to strike matches.

"Ah, Mr. President, these are some of the iniquities of this bill. It is no wonder that the Senator from Utah sits there with his head bowed in shame over it."[21]

Senator Harrison's most outstanding government service was his work as Chairman of the Finance Committee of the Senate from 1933 until his death in 1941, but even before that time he had made some conspicuous speeches on government finances. During the closing weeks of the Hoover Administration much discussion was carried on in the Senate regarding the curtailment of expenses. The Mississippian created an uproar of laughter, and some sober thought, when he took the floor to point out that one possible economy would be the foregoing of the $20,000,000 a year spent on the preparation and publication of bulletins, a great many of which, to put it mildly, were useless. He proceeded to cite some of the most interesting examples he had uncovered:

"*Utilization of the Calcium in Spinach.* No doubt that will relieve many farmers in distress.

"*Lamb as You Like It.* What department, whether the Agricultural Department or any other, can tell me the way lamb should be cooked as I like it.

"*Bringing up Bobby.* That tells us how to bring up children.

"*The Use of the Metric System in Nutrition.* (Laughter).

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[21]71 Cong. Rec. 8 (1929)

"Children's Rompers. (Laughter). They have pictures of children's rompers in this one. It is a beautiful thing, and it tells you not to fit the rompers too tight; that they must be loose, because if they are fitted too close the children will be deformed when they grow up.

"How to Dress for a Sun Bath. Now, that is a wonderful thing. When I was a boy I did not dress for a sun bath, but the Department of Agriculture tells you how to do it. . . .

"Here is one that is written on *Canal Boat Children.* It tells you that there are but 353 in the whole United States but they get out a pamphlet on how to care for these canal boat children. . . .

"Great information we are getting out! Why, Mr. President, they even have one—I have not it here, but I read it with interest; it was one of the most fascinating and interesting pieces of literature that has come to my attention in years. It is on frogs. It told of the *"Love Adventures of the American Bullfrog."* (Laughter).

"Before reading this romantic story of the frog I thought I knew something about frogs. When I was a boy I was their pal. I carry to this day living evidence of my close contact with them, but not until reading this bulletin did I realize some characteristics of the adventurous bullfrogs. It told how courageous he was, and that as he and his fair Juliet sat in the sun rays upon some old log in a lonesome river, at the first approach of footsteps or noise the gentleman frog would jump off ahead to warn his fair lady that she must get out of danger also. It gave me a very refreshing information that the gentleman frog croaks or sings only when he is in love. (Laughter).

"Then they have a pamphlet here on *How to Make a Cat Trap.* It tells you that after you remove the cat from the cat trap, if you will get a sack and put it over his head, you can take him out to the river and drown him without his escaping or knowing anything about it. (Laughter).

"I heard of an Englishman who came over here, and he was fascinated by our fireflies, or lightning bugs, as we call them in my country, and he wanted to find out something about them; so he inquired of a friend where in the world he could get information about the lightning bug. The friend said to him, of course, 'We will go down to the Department of Agriculture and we will question them. Maybe we can get the information there.'

"They went, and after they had been through the labyrinths of the various offices and departments they came to a rosy-cheeked, ascetic, mild-mannered, soft-speaking individual behind a desk, and he was the man who acknowledged that many years ago he had written such a bulletin. So he reached down into some old dust-covered pile of papers and books and finally brought out one of those lightning bug pamphlets and handed it to the Englishman, and explained it to him.

"The Englishman, with face wreathed in smiles, said, 'My friend, I want to thank you.' The mild-mannered man said, 'Don't thank me. For twenty years I gave study to that particular subject, and put all my time and work on it, and you are the first man who has shown any interest in the lightning bug. Don't thank me. I thank *you.*' "[22]

The speech produced editorial comment all over the country and brought literally hundreds of letters from every state in the union to Harrison's office.[23] The author of the pamphlet on frogs wrote from Cornell University, where he was a distinguished professor: "Having never written a compulsory or best selling textbook in 32 years of teaching, having never sought appointive or elective office, you must appreciate that this my immortal monument is very important to me. . . . Furthermore, we will continue to give Mississippi graduates who appear here, preferential treatment and consideration if only you will send me a copy of that speech."[24] The only noticeable result of the speech was that the frog pamphlet was in such demand that a reprint had to be issued and the price was raised from ten to fifteen cents per copy.[25]

Fortunately, Harrison could include himself in his sarcasm. "Who ever heard of a man in public life advertising himself, or lauding his services? It is a reflection upon the modest members of the untarnished group of which I happen to be a part, to even intimate that they would seek publicity or covet the first page of the daily press. . . .

"To practice the science of propaganda is unreservedly condemned by us. Deception is abominable; exaggeration is shunned like a serpent, and hypocrisy stands abashed in our presence. No censorship is ever needed or has ever been suggested where our verbal contributions to the permanent literature and state-craft of our nation are concerned. . . .

"We prefer to have the office seek the man; so like Castoria, the people cry for us. It is because of these fine and exceptional traits that our untarnishd craft stands so high in the esteem of all the people. . . ."[26]

Of course, the wrong construction was sometimes placed upon the speeches of august Senators. Harrison gave an example of such a misunderstanding: "A few years ago I was delivering some unnecessary remarks at a great national convention of my party. I took occasion in the course of my remarks to employ the phrase—'that what the country needed was not a sphinx, but a Paul Revere to awaken it and to call it back to duty and high resolve.' During my speech some of the delegates had gone to sleep, and one of them from New York, when I mentioned the name of Paul Revere, suddenly awakened, blinked his eyes, and began to applaud. The delegate seated next to him said, 'Bill, what in the devil is the matter

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[22]75 Cong. Rec. 1394-1396 (1931).
[23]See numerous clippings and hundreds of letters in HARRISON PAPERS.
[24]HARRISON PAPERS (A. H. Wright to Harrison, April 9, 1932).
[25]*Id.* (Harrison to Roy J. Barnett, April 12, 1932).
[26]*Id.* (Speech before Advertising Federation of America, May 20, 1930).

with you?' To which Bill replied, 'Didn't you hear that man say he was for light wine and beer?' "[27]

One of the most delightfully humorous speeches the Mississippi Senator ever made was before the Advertising Federation of America in which he teased the delegates unmercifully about some of the advertisements they had been putting over on the public:

"Recently I saw an advertisement carried in one of the great magazines of the country, propounding this question to the wives of the land, 'Is your husband beginning to look around?' Now, that is bad enough, but you were not content, but added the further question, 'Doesn't he notice other women more as your hair grows grayer?' How brutal is such a question to a wife! In the first place, if her husband was beginning to look around or notice other women, she would be the last to know it. . . .

"How unfair is the advertisment that by trying a certain lipstick 'you will be kiss-proof all day.' What woman is there who wants to be kiss-proof even for a day?" The Senator went on quoting example after example of products whose advertisements made the users ridiculous, or, at least, the manufacturer made absurd assertions about them.[28]

Perhaps, it was only natural that Pat Harrison often told yarns about the Southern Negro to illustrate his points. At the convention dinner of the American Red Cross on April 12, 1932, he delighted the delegates by telling them how the colored folk in Mississippi felt about their organization after the relief work during the 1927 flood. His drawl and his mastery of the dialect added much to the stories.

It did not infrequently happen that after the Negroes had been helped by "de Cross," as they called it, that they were disinclined to return to work.

"Two negroes were lounging about. One inquired of the other if he was working.

"I sho thought you was workin' in de cotton field," the first negro said.

" 'No, sah. I ain't. I was, but I done jine de Cross now; so I'se quit.' "

Some of the "clients" of the Red Cross were rather choosy when any immediate emergency was past. During the drought in 1931 the Red Cross in one section of Mississippi received a carload of bulk lard. The local chapter put it up in Brer Rabbit molasses cans, since those were the only containers available. A colored man took a can home and the next day his wife appeared:

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[27] *Id.* (Speech at 148th Anniversary Dinner of the Friendly Sons of Saint Patrick, Hotel Astor, New York, March 17, 1932).

[28] *Id.* (Speech before the Advertising Federation of America, May 20, 1930).

"Missy, kin I have some lard?" she asked. "You know, I jes' cain't stand dat rabbit grease."

During the same drought period the Red Cross received a carload of citrus fruit from Florida and as a result, grapefruits were included in the rations given to the Negroes. Shortly a poorly written letter came back expressing appreciation for the rations, but adding "We don't care for any more of the breakfast melon." One of the farm hands suspected a little duplicity on the part of the Red Cross. On returning for another two weeks' rations, he politely explained: "No'm, I don't want no more of dem big fruits. When I takes quinine, I takes it in a capsule."[29]

[29] *Id.* (Speech before Red Cross Convention Dinner, April 12, 1932).

A REVIEW OF THE MISSISSIPPI CASES ON HOMESTEAD LAW

*M. B. Montgomery**

I. *Nature of Estate in General*

"Every citizen of this State, male or female, being a householder, and having a family, shall be entitled to hold exempt from seizure or sale, under execution or attachment, the land and buildings owned and occupied as a residence by him or her, but the quantity of land shall not exceed one hundred and sixty acres, nor the value thereof, inclusive of improvements, save as hereinafter provided, the sum of three thousand dollars, provided, however, that in determining this value, existing encumbrances on such land and buildings, including taxes and other liens, shall first be deducted from the actual value of such land and buildings. But husband or wife, widower or widow, over sixty years of age, who has been an exemptionist under this section, shall not be deprived of such exemption because of not having family or not occupying the homestead."

Such is the language of our statute.[1] The status of a homestead which the statute impresses on property does not change the nature of the estate in the property owned by the exemptionist, but merely exempts such liabilities and limits the owner's inherent powers of alienation.[2] Accordingly, our court has held that the right to a homestead exemption in land is conditioned upon the ownership by the exemptionist of some assignable interest in the land and cannot be based on mere occupation.[3] A slight valid claim of an assignable interest in the land is, however, sufficent ownership of the land to impress it with the character of a homestead, if it otherwise meets the requirement of the statute, but no mere "squatter" or intruder has any such interest as constitutes the necessary ownership.[4] The ownership may be a tenancy at will or any other tenure except that of mere intrusion or trespass[5] and his right is not affected by the nature of his estate, whether it be in fee simple, for life, for years, or a mere possessory interest.[6] A co-tenant may assert a homestead exemption in the common property[7] and this right exists regardless of the consent or lack of it on the part of the other co-tenants to the occupation by exemptionist.[8]

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*Yazoo City, Miss.; Miss. State Bar; Chancellor, Eleventh Chancery District of Mississippi.

[1]MISS. CODE ANN. (1930) § 1765.

[2]Massey v. Womble, 69 Miss. 347, 11 So. 188 (1891).

[3]Jones v. Lamensdorf, 175 Miss. 565, 167 So. 624 (1936); Krippendorf v. Wolf, 70 Miss. 81, 12 So. 26 (1892); Berry v. Dobson, 68 Miss. 483, 10 So. 45 (1891).

[4]Stuart v. Kennedy, 145 Miss. 728, 110 So. 847 (1927).

[5]King v. Sturges, 56 Miss. 606 (1879).

[6]McGrath v. Sinclair, 55 Miss. 89 (1877).

[7]Jones v. Lamensdorf, 175 Miss. 565, 167 So. 624 (1936); Krippendorf v. Wolf, 70 Miss. 81, 12 So. 26 (1892); McGrath v. Sinclair, 55 Miss. 89 (1877).

[8]Chapman v. White Sewing Machine Co., 78 Miss. 441, 28 So. 735 (1900); Lewis v. White, 69 Miss. 355, 13 So. 349 (1891).

The leasehold estate of a tenant for years is sufficient ownership to support the exemption,[9] and the right to a homestead exemption is not governed by the mistaken or false statement of the exemptionist to the effect that he had no homestead exemptions, but depends upon and is controlled entirely by the fact of his being entitled to the exemption under the law.[10]

Whatever name may be given to the wife's interest in the homestead, whether it be called an estate, or an interest, or a claim, or a right, or a veto power merely,[11] it is such an interest or right as the statute[12] requires to be conveyed by a deed,[13] and meets the requirement that the exemptionist must own an assignable interest in the land before the homestead exemption can attach.[14]

By no provision of law is the child, during the lifetime of the parent, given any assignable interest in the homestead land or other lands of the father or mother.[15] On the death of the exemptionist intestate, however, an interest in the homestead passes by statute[16] to the widow and to the children or grandchildren of exemptionist, free from the debts of deceased.[17]

II. *Construction of Homestead Laws in General*

The intention of the exemption laws is to enable the debtor to earn a living and create the means with which to pay debts, and to prevent hardship and suffering of families growing out of the improvident contracts of the head of the family, incurrings debts;[18] and early in the history of the state the rule was laid down by the courts that the homestead laws would be construed liberally for the exemptionist.[19] The homestead right is favored by the law. When there is a serious doubt as to whether the property is a homestead, the doubt is to be solved in favor of the exemption.[20] However, the statutes must be construed sensibly[21] and a liberal construction may not be used as a pretext to support a claim which does not really and substantially exist.[22]

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[9]Johnson v. Richardson, 33 Miss. 462 (1857).
[10]Hinds v. Morgan, 75 Miss. 519, 23 So. 35 (1898).
[11]Kimbrough v. Powell, 143 Miss. 498, 108 So. 498 (1926).
[12]Miss. Code Ann. (1930) §§ 1778, 1780; Kimbrough v. Powell, 143 Miss. 498, 108 So. 498 (1926).
[13]Columbian Mutual Life Ins. Co. v. Jones, 160 Miss. 41, 133 So. 149 (1931); Gulf & S. I. R. R. v. Singleterry, 78 Miss. 772, 29 So. 754 (1901).
[14]Berry v. Dobson, 68 Miss. 483, 10 So. 45 (1891).
[15]Rawlings v. Rawlings, 121 Miss. 140, 83 So. 146 (1919).
[16]Miss. Code Ann. (1930) § 1410.
[17]Martin v. Martin, 84 Miss. 553, 36 So. 523 (1904); Wiseman v. Parker, 73 Miss. 378, 19 So. 102 (1895).
[18]Jackson v. Coleman, 115 Miss. 535, 76 So. 545 (1917).
[19]Jackson v. Coleman, 115 Miss. 535, 76 So. 545 (1917); Gilmore v. Brown, 93 Miss. 63, 46 So. 840 (1908); Hinds v. Morgan, 75 Miss. 509, 23 So. 35 (1898).
[20]Dogan v. Cooley, 184 Miss. 106, 185 So. 783 (1939); Levis-Zukoski Mercantile Co. v. McIntyre, 93 Miss. 806, 47 So. 435 (1908).
[21]Gardner v. Cook, 173 Miss. 244, 158 So. 150 (1934).
[22]Mounger v. Gandy, 110 Miss. 133, 69 So. 817 (1915).

III. *Persons Entitled to Claim Homestead Exemption*

(a) Head of Family

The head of the family has the right to choose the homestead[23] and to move from one and select another.[24] The homestead exemption, however, is dependent upon the fact that the claimant is either the head of the family[25] or a former exemptionist over sixty years of age.[26] Even where land is subject to a judgment lien and, before execution sale thereof, the debtor marries and occupies the premises with his wife, he becomes the head of a family and is entitled to the exemption regardless of how short the time of his occupancy before the sale.[27] It has been held that an insolvent debtor may buy land in the name of his wife and children; and if he occupies the land he may claim a homestead exemption therein, regardless of his fraud upon his creditors.[28] Also, a married woman, owning a separate property and residing upon it with her husband is such a head of the family as is entitled to the exemption.[29] But a childless widower, who had residing with him an informally adopted daughter, whom he did not support, was held not to be the head of a family and not entitled to the exemption.[30] However, this has now been changed by statute[31] so as to allow the exemption in cases of former exemptionists over sixty years of age. But even before the enactment of this statute[32] it was held that a widower, moving from a sister state and having children, who were being supported by him, was the head of a family and entitled to the exemption though his children remained at school in the sister state.[33]

(b) Citizens and Residents

The homestead exemption may be allowed in favor of residents only of this state,[34] and only a person who is both a citizen and a resident of this state, as well as a householder, is entitled to claim it.[35] The mere fact of non-residence will defeat the right to the exemption.[36]

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[23]Patrick v. Bank of Tupelo, 169 Miss. 157, 152 So. 838 (1934); Tanner v. Tanner, 111 Miss. 460, 71 So. 749 (1916).

[24]Cliett v. First Nat. Bank, 182 Miss. 560, 181 So. 713 (1938); Ritter v. Whitesides, 179 Miss. 706, 176 So. 728 (1937).

[25]Patrick v. Bank of Tupelo, 169 Miss. 157, 152 So. 838 (1934); Acker v. Trueland, 56 Miss. 30 (1878); Perrington v. Seal, 49 Miss. 518 (1878).

[26]Miss. Code Ann. (1930) § 1779, amended by Miss. Laws 1938, c. 125.

[27]Dulion v. Harkness, 80 Miss. 14, 31 So. 416 (1902); Jones v. Hart, 62 Miss. 13 (1884); Letchford v. Cary, 52 Miss. 791 (1876); Irwin v. Lewis, 50 Miss. 363 (1874); Trotter v. Dobbs, 38 Miss. 198 (1859).

[28]Edmondson v. Meacham, 50 Miss. 34 (1874).

[29]Hand v. Winn, 52 Miss. 784 (1876); Partee v. Stewart, 50 Miss. 717 (1876).

[30]Powers v. Sample, 72 Miss. 187, 16 So. 293 (1894); Hill v. Franklin, 54 Miss. 632 (1877).

[31]Miss. Code Ann. (1930) § 1765, amended by Miss. Laws 1938, c. 125; Miss. Code Ann. (1930) § 1779.

[32]Miss. Laws 1914, c. 225.

[33]Roberts v. Thomas, 94 Miss. 219, 48 So. 408 (1909).

[34]Miss. Code Ann. (1930) § 1781.

[35]Meyer Bros. Drug Co. v. Fly, 105 Miss. 752, 63 So. 227 (1913); Vignaud v. Dean, 77 Miss. 860, 27 So. 881 (1900).

[36]Borodofski v. Feld, 88 Miss. 31, 40 So. 816 (1906).

(c) Householder

The term "householder," in the statute allowing homestead exemptions to a debtor householder under sixty years, means a person who has a family which he keeps together and provides for and of which he is the head and master.[37] But the fact that a child is more than twenty-one years old does not destroy the natural or moral obligation to give help necessary to enable the child to obtain an education; and a mother supporting two adult sons living with her, one of whom was attending college, and also supporting a daughter temporarily confined in an insane hospital, was held to be a householder and family head entitled to homestead exemption.[38]

(d) Exemptions Over 60 Years of Age

It is provided by our statute[39] that a husband or wife, widower or widow, over sixty years of age, who has been an exemptionist under this section, shall not be deprived of such exemption because of not having a family or not occupying the homestead. This amendment to our statute was made in 1914,[40] but it has been held that it does not create any new exemption but only preserves existing exemptions formerly guaranteed under the statute.[41]

IV. *Acquisition and Establishment of Homestead*

(a) Necessity of Occupancy

The mere intention to occupy and reside upon premises as a home at some future time and the placing of household goods thereon is not sufficient to create a homestead exemption;[42] but to hold land and buildings exempt as a homestead, they must be owned and actually occupied as a residence by the party entitled to the exemption.[43]

(b) Character and Mode of Occupancy

The actual, physical, continuous occupation of the homestead by some of the family is not always required; for temporary absence, while traveling or visiting,[44] temporary residence in town for employment,[45] for church

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[37]Moore v. Sykes' Estate, 167 Miss. 212, 149 So. 789 (1933).

[38]Holsomback v. Slaughter, 177 Miss. 553, 171 So. 542 (1937).

[39]Miss. Code Ann. (1930) § 1765, amended by Miss. Laws 1938, c. 125; Miss. Code Ann. (1930) § 1779.

[40]Miss. Laws 1914, c. 225.

[41]Kimbrough v. Powell, 143 Miss. 498, 108 So. 498 (1926).

[42]Chrismand v. Mauldin, 130 Miss. 259, 94 So. 1 (1922).

[43]Meyers v. American Oil Co., 192 Miss. 180, 5 So. (2d) 218 (1940); Bank of Cruger v. Hodge, 189 Miss. 356, 198 So. 26 (1940); Patrick v. Bank of Tupelo, 169 Miss. 157, 152 So. 838 (1934); Chrismand v. Mauldin, 130 Miss. 259, 94 So. 1 (1922); Mounger v. Gandy, 110 Miss. 133, 69 So. 817 (1915).

[44]Campbell v. Adair, 45 Miss. 170 (1871).

[45]Bank of Cruger v. Hodge, 189 Miss. 356, 198 So. 26 (1940); Collins *et al.* v. Bounds, 82 Miss. 447, 34 So. 355 (1903).

and school purposes,[46] or for treatment by a physician[47] with an intention to return thereto, while leaving the homestead in charge of a tenant or overseer, are sufficient occupation of the premises.[48] But the divorced owner of wild land, never cultivated nor occupied as a homestead, cannot assert homestead rights therein against the purchaser at foreclosure sale of a trust deed made by the husband, prior to land vesting in her as part of divorce proceedings;[49] for the occupancy or reoccupancy must be such as will stamp the place claimed as a homestead with the character then and there of an actual and permanent residence of debtor and his family, and it is not sufficient that it has been made a mere part-time lodging place, while the real family residence remains elsewhere.[50]

However, where a country homestead has been abandoned by the owner, who acquires another homestead in town, the country homestead, nevertheless, becomes revested with its homestead character, when the owner afterward abandons the town place and forms a fixed intention and makes preparations to reoccupy the country homestead as soon as possible, but is prevented from so doing by illness resulting in his death.[51] The homestead exemption attaches immediately upon the occupancy of the land and the homestead exemption must be allowed regardless of the brevity of the time of the occupancy before the sale or attempted sale of the land.[52] And where a householder owned a town lot upon which were situated two houses, separated by a fence, one of which the householder usually occupied as a family residence, but which, when summer visitors came, she rented out, and sojourned with her family in the other, the entire lot was exempt as a homestead.[53] But where a lot is intersected by a public road on one side of which were the residence and other buildings, enclosed by a fence, and on the other side were stores rented out and occupied by tenants, it was held that the stores were not part of the homestead.[54]

As a general rule property does not become impressed with the character of a homestead until actual residence or occupation by a family as a home; it must be appropriated, dedicated, or used as such.[55] Where an exemptionist owns adjoining tracts of land, either of which he might select as a homestead, and gives a trust deed on one of them, he will be held

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[46]Gilmore v. Brown, 93 Miss. 63, 46 So. 840 (1908).

[47]Columbian Mutual Life Ins. Co. v. Jones, 160 Miss. 41, 133 So. 149 (1931).

[48]Levis-Zukoski Mercantile Co. v. McIntyre, 93 Miss. 806, 47 So. 435 (1908); Collins v. Bounds, 82 Miss. 447, 34 So. 355 (1903); Moore v. Bradford, 70 Miss. 70, 11 So. 630 (1892); Majors v. Majors, 58 Miss. 806 (1881).

[49]Mounger v. Gandy, 110 Miss. 133, 69 So. 817 (1915).

[50]Bank of Cruger v. Hodge, 189 Miss. 356, 198 So. 26 (1940).

[51]Ross v. Porter, 72 Miss. 361, 16 So. 906 (1895).

[52]Bank of Cruger v. Hodge, 189 Miss. 356, 198 So. 26 (1940); Dulion v. Harkness, 80 Miss. 14, 31 So. 416 (1902); Jones v. Hart, 62 Miss. 13 (1884); Letchford v. Cary, 50 Miss. 34 (1876); Irwin v. Lewis, 50 Miss. 363 (1874); Trotter v. Dobbs, 38 Miss. 198 (1859).

[53]Colbert v. Henley, 64 Miss. 374, 1 So. 631 (1887).

[54]Semmes v. Wheatley, 7 So. 430 (Miss. 1889).

[55]Campbell v. Adair, 45 Miss. 170 (1871).

to have selected the other land as his homestead.[56] Any citizen entitled to a homestead may select or declare the same, as provided by our statute;[57] but such a declaration of homestead has no application to debts contracted before the code became operative.[58] And if a homesteader lives on a forty-acre tract of land leased by him joining that to which he has title, and his farm be in part on both tracts, he may claim exemption, but the homestead must be laid off just as if he owned the tract on which he resides.[59]

On the death of the homesteader, his heirs, under the earlier statute,[60] took the homestead precisely as the homesteader left it; and they were without power to make a selection of homestead under the statute,[61] and were confined to the selection made by the homesteader in his lifetime.[62] But this was changed by statute in 1912[63] and now, whether the deceased made a selection or not, the heirs may have an allotment made in the manner provided by the statute.[64] The method provided by such statute is exclusive and the court has no power otherwise to make the allotment.[65] If the land on which the person claiming the exemption resides has a value in excess of three thousand dollars, inclusive of improvements, but exclusive of liens and encumbrances[66] and if it brings more than three thousand dollars at the sale, the execution debtor is entitled to $3000.00 out of the proceeds of sale; but if the sale does not bring $3000.00 it should be abandoned.[67] If the homestead exceeds the statutory value the sheriff cannot select and sell part of it,[68] but must proceed according to the statute.[69]

V. *Property Constituting Homestead*

If it is in a municipality, a homestead may include lots separated from the dwelling house by a public street, provided they are used as a part of

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[56]Rutherford v. Jamieson, 65 Miss. 219, 3 So. 412 (1887).

[57]Miss. Code Ann. (1930) § 1767.

[58]Hinds v. Morgan, 75 Miss. 509, 23 So. 35 (1898).

[59]Hinds v. Morgan, 75 Miss. 509, 23 So. 35 (1898); Parisot v. Tucker, 65 Miss. 439, 4 So. 113 (1888); Acker v. Trueland, 56 Miss. 30 (1878).

[60]Miss. Code Ann. (1930) § 1410; Miss. Code (1892) § 1975.

[61]Wiseman v. Parker, 73 Miss. 378, 19 So. 102 (1895).

[62]*Ibid.*

[63]Miss. Laws 1912, c. 216.

[64]Miss. Code Ann. (1930) §§ 1767, 1770.

[65]Bruce v. Spears, 181 Miss. 786, 181 So. 333 (1938); Willis v. Allen, 131 Miss. 264, 95 So. 435 (1923); Wiseman v. Parker, 73 Miss. 378, 19 So. 102 (1895); Howell v. Bush, 54 Miss. 437 (1877).

[66]Dogan v. Cooley, 184 Miss. 106, 185 So. 783 (1939), overruling Clark v. Edwards, 180 Miss. 97, 177 So. 361 (1937). When *Clark v. Edwards* was decided in 1937, the Legislature promptly passed Miss. Laws 1938, c. 125 amending Miss. Code Ann. (1930) § 1765 so as expressly to exempt liens and encumbrances from the gross value of the land and leave the net value of same exempt up to $3000.00. After the amendment was made, the question came before the court again in 1939; and the court held that *Clark v. Edwards* was erroneous and overruled it.

[67]Dogan v. Cooley, 184 Miss. 106, 185 So. 783 (1937).

[68]Rhyne v. Guevara, 67 Miss. 139, 6 So. 736 (1889); Miss. Code Ann. (1930) §§ 1771, 1772.

[69]Miss. Code Ann. (1930) § 1771.

the homestead,[70] and may include land without the town, if it lies in one tract;[71] but, since the statute exempts only "The land and buildings owned and occupied as a residence," the homestead does not include a town residence and land that lies outside of the town in a wholly separate tract.[72] The head of a family residing in a house on land belonging to a railroad company and who owns and cultivates a tract of forty acres adjacent to it, about three hundred yards from his residence, the two tracts being less than the statutory limitation, is not precluded from claiming the forty acres as exempt.[73] The head of a household owning an urban lot upon which are situated two houses, in one of which she usually resides with her family, but who at other times, when summer visitors resort to the town, rents out her residence and sojourns temporarily with her family in the other, the two being separated by a fence only, may claim the whole as a homestead if the value does not exceed the statutory limit.[74] Likewise, one owning and occupying with his family a four acre lot in a village, and conducting thereon a hotel business, and owning and cultivating a seventy-four acre tract separated from such lot only by a railroad right of way and depot grounds, may hold both as his homestead if the value does not exceed the statutory limit.[75]

And the exemption may consist of two adjoining tracts, one the husband's and the other the wife's;[76] or it may consist of a leased forty acres and an adjoining forty owned in fee,[77] but it must be owned and occupied as a residence.[78] So, a debtor residing in a town, who owns another lot just across a street, whereon are situated his orchard, vineyard, and servants' house, but which has been rented out for two years, cannot claim such lot as part of his homestead.[79] Where debtor owns an acre lot intersected by a public road, on one side of which is the dwelling in which the family resides and on the other side of the road are two stores rented to tenants, the last mentioned parcel cannot be claimed as part of the homestead.[80] It was formerly considered that where one, having sold his homestead and taken a note for the purchase money, removes therefrom but afterwards procures it to be conveyed to his wife in consideration of a surrender of the note, the property might be subjected in equity to a judgment which was a lien at the time of the sale.[81] Now, however, the statute provides that the proceeds of insurance and the proceeds of sale of such

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[70]Acker v. Trueland, 56 Miss. 30 (1878).
[71]Fitzgerald v. Rees, 67 Miss. 473, 7 So. 341 (1889).
[72]Nye v. Winborn, 120 Miss. 1, 81 So. 644 (1919).
[73]King v. Sturges, 56 Miss. 606 (1879).
[74]Colbert v. Henley, 64 Miss. 374, 1 So. 631 (1886).
[75]Parisot v. Tucker, 65 Miss. 439, 4 So. 113 (1888).
[76]Powers v. Sample, 69 Miss. 67, 12 So. 337 (1891).
[77]Hinds v. Morgan, 75 Miss. 509, 23 So. 35 (1897).
[78]Miss. Code Ann. (1930) § 1765, amended by Miss. Laws 1938, c. 125; Miss. Code Ann. (1930) § 1779.
[79]Rhyne v. Guevara, 67 Miss. 139, 6 So. 736 (1889).
[80]Semmes v. Wheatley, 7 So. 430 (Miss. 1890).
[81]Smith v. Ratcliff, 66 Miss. 683, 6 So. 460 (1889); Adams v. Dees, 62 Miss. 354 (1884).

property are also exempt;[82] and the exempt property does not, by disposal, become liable to the debts of the owner.[83] Neither the surviving partner nor the heirs of a deceased partner can acquire any interest in the partnership property adverse to the trust imposed upon it for the payment of firm debts. Until all such debts are paid, the widow of a deceased partner is not entitled to a homestead exemption in partnership property.[84] But land paid for with homestead land is homestead property, even though the deed be taken in the name of the wife.[85]

VI. *Liabilities Enforceable Against Homestead*

It has been held that a homestead secured subsequent to the issuance of a decree providing for sale of the property to satisfy claim of creditors, but secured previous to such sale being made, is superior to the creditor's lien under the decree.[86] But prior covenants or encumbrances running with the land defeat homestead exemptions arising subsequently thereto, and an option to purchase land is enforceable against the grantor before or after he marries and occupies it as a homestead.[87] Homestead property is not exempt from execution when the purchase money thereof forms, in whole or in part, the debt on which the judgment is founded;[88] but if the judgment be not in whole for purchase money and the execution be levied on property otherwise exempt and the exemptionist pay or otherwise tender the amount of purchase money included in the judgment before sale, the property shall be released;[89] but homestead property is not exempt from sale for non-payment of taxes,[90] or assessments, or for any labor done thereon or materials furnished therefor,[91] or when the judgment is for labor performed, or upon a forfeited recognizance or bail bond.[92] A homestead is not subject to a demand for alimony where there are children, unless the pleadings and decree in the divorce action describe and show the necessity for a lien on the homestead,[93] nor is it subject to sale to pay the

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[82]Miss. Code Ann. (1930) § 1755 (b).

[83]DeBardelleben Coal Corp. v. Parker, 164 Miss. 728, 145 So. 341 (1933); Miss. Code Ann. (1930) § 1777.

[84]Hamilton v. Halpin, 68 Miss. 99, 8 So. 739 (1890); Robertshaw v. Hanway, 52 Miss. 713 (1876).

[85]Airey v. Buchanan, 64 Miss. 181, 1 So. 101 (1887).

[86]Barnes & Co. v. Buchannan, 108 Miss. 822, 67 So. 462, 68 So. 81 (1915).

[87]Smith v. Smith, 193 Miss. 201, 8 So. (2d) 461 (1942); Minor v. Interstate Gravel Co., 130 Miss. 553, 94 So. 3 (1922); Mounger v. Gandy, 110 Miss. 133, 69 So. 817 (1915).

[88]Miss. Code Ann. (1930) § 1775; Box v. Early, 181 Miss. 19, 178 So. 793 (1938); Patrick v. Rembert, 55 Miss. 87 (1877).

[89]Miss. Code Ann. (1930) § 1775.

[90]Lackey v. Harrington, 162 Miss. 512, 139 So. 313 (1932).

[91]Chatman v. Poindexter, 101 Miss. 496, 58 So. 361 (1912); Mitchner v. Robbins, 73 Miss. 383, 19 So. 103 (1895). *But see* Welch v. Thigpen, 172 Miss. 5, 159 So. 101 (1935). *Quaere?*

[92]Miss. Code Ann. (1930) § 1775.

[93]Felder v. Felder's Estate, 13 So. (2d) 823 (Miss. 1943); Felder v. McCormick, 191 Miss. 851, 4 So. (2d) 363 (1941); Jackson v. Coleman, 115 Miss. 535, 76 So. 545 (1917).

year's allowance to the widow provided by Section 1654 of the Mississippi Code of 1930.[94]

VII. *Abandonment of Homestead*

It is provided by our statute[95] that whenever the debtor shall cease to reside on his homestead, it shall be liable to his debts, unless his removal be temporary, by reason of some casualty or necessity and with the purpose of speedily reoccupying it as soon as the cause of his absence can be removed.[96] The word "casualty," as used in the statute, refers to accident, while "necessity" may embrace considerations of health, or travel, or public business, or private business emergency of an exceptional and temporary character;[97] and a temporary absence *animo revertendi* will not constitute an abandonment.[98] Nor is confinement in jail an abandonment,[99] for the homestead laws are to be liberally construed in favor of debtor, and there has been no abandonment unless it is clear that exemptionist moved from the homestead with the intention of not returning.[100] So, a temporary absence while traveling or visiting[101] or for treatment by a physician,[102] or for employment,[103] or for church and school purposes[104] with intention to return thereto, while leaving the homestead in charge of a tenant or overseer, is sufficient occupation of the premises.[105]

But, in a case in which a husband was directed by his employer to take up his residence in another state and the husband did not return after being discharged from the employment, the removal constituted an abandonment.[106] And so, moving from the homestead to conduct a boarding house in a nearby town with borrowed money secured by mortgage on the homestead was abandonment thereof, although the owner intended to return if she did not pay for the place moved to.[107] When an exemptionist moves to another state, where he organizes a business and becomes the manager, with no intention of returning, if the business proves successful. the removal is not by reason of casualty or necessity, as provided in the

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[94]Miers v. Miers, 160 Miss. 746, 133 So. 133 (1931).

[95]Miss. Code Ann. (1930) § 1776.

[96]*Ibid.*

[97]Moore v. Bradford, 70 Miss. 70, 11 So. 630 (1892); Thompson v. Tillotson, 56 Miss. 36 (1878).

[98]Campbell v. Adair, 45 Miss. 170 (1871).

[99]Lindsley v. Holly, 105 Miss. 740, 63 So. 222 (1913).

[100]Jackson v. Coleman, 115 Miss. 535, 76 So. 545 (1917).

[101]Campbell v. Adair, 45 Miss. 170 (1871).

[102]Columbian Mutual Life Ins. Co. v. Jones, 160 Miss. 41, 133 So. 149 (1931).

[103]Bank of Cruger v. Hodge, 189 Miss. 356, 198 So. 26 (1940); Collins v. Bounds, 82 Miss. 447, 34 So. 355 (1903).

[104]Gilmore v. Brown, 93 Miss. 63, 46 So. 840 (1908).

[105]Levis-Zukoski Mercantile Co. v. McIntyre, 93 Miss. 806, 47 So. 435 (1915); Collins v. Bounds, 82 Miss. 447, 34 So. 355 (1903); Culp v. Wooten, 79 Miss. 503, 31 So. 1 (1901); Moore v. Bradford, 70 Miss. 70, 11 So. 630 (1892); Majors v. Majors, 58 Miss. 806 (1881); Thompson v. Tillotson, 56 Miss. 36 (1878).

[106]Salter v. Embry, 18 So. 373 (Miss. 1895).

[107]Bennett v. Dempsey, 94 Miss. 406 (1909); Rutherford v. Jamieson, 65 Miss. 219, 3 So. 412 (1887).

statute;[108] and there is a consequent abandonment of the homestead,[109] and if one goes to another state and obtains work there and his return is contingent upon obtaining more favorable work near homestead, he has ceased to reside on the homestead and there has been a consequent abandonment.[110] Living on land as a residence and then ceasing to reside on it for several months are not sufficient to exempt the land as a homestead;[111] and where there is nothing to indicate that at the time of removal there is retained an intention to return after the casualty or necessity has been removed, then the removal is an abandonment.[112]

VIII. *Transfer or Encumbrance of Homestead*

(a) Generally.

It is provided by our statutes[113] that no conveyance, mortgage, deed of trust or other encumbrance upon the homestead shall be valid or binding unless signed by the wife or husband of the owner if they be married and living as husband and wife, unless such husband or wife be insane, in which event the statutes[114] provide the procedure to be followed in so dealing with the homestead. Accordingly, any conveyance, mortgage, deed of trust or other encumbrance upon the homestead, where the owner is married and living with his spouse, is absolutely void unless signed by the spouse;[115] but a deed of trust to secure purchase money[116] or to secure labor done thereon or materials furnished therefor[117] is valid without the signature of the other spouse, and the signature or consent of the spouse is not necessary in order to permit the attaching of liens for taxes and

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[108]Miss. Code Ann. (1930) § 1776.

[109]Meyer v. Fly, 105 Miss. 752, 63 So. 227 (1913).

[110]Bank of Hattiesburg v. Mollere, 118 Miss. 154, 79 So. 87 (1918).

[111]Wright v. Wright, 160 Miss. 235, 134 So. 197 (1931).

[112]Ritter v. Whitesides, 179 Miss. 706, 176 So. 728 (1937); Wright v. Wright, 160 Miss. 235, 134 So. 197 (1931).

[113]Miss. Code Ann. (1930) §§ 1778, 1780.

[114]*Ibid.*

[115]Smith v. Smith, 193 Miss. 201, 8 So. (2d) 461 (1942); Robert G. Bruce Co. v. Spears, 181 Miss. 786, 181 So. 333 (1938); Federal Land Bank v. Miles, 169 Miss. 43, 152 So. 472 (1934); Gardner v. Cook, 173 Miss. 244, 158 So. 150 (1934); Breland v. Parker, 150 Miss. 476, 116 So. 879 (1928); Blair v. Russell & Co., 120 Miss. 108, 81 So. 785 (1919); Chatman v. Poindexter, 101 Miss. 496, 58 So. 361 (1912); Yazoo Lumber Co. v. Clark, 95 Miss. 244, 48 So. 516 (1909); Zukoski v. McIntyre, 93 Miss. 806, 47 So. 435 (1908); Moseley v. Larson, 86 Miss. 288, 38 So. 235 (1905); Bolen v. Lilly, 85 Miss. 344, 37 So. 811 (1904); Collins v. Bounds, 36 So. 689 (Miss. 1904); Hubbard v. Sage Land & Implement Co., 81 Miss. 616, 33 So. 413 (1903); Johnson v. Hunt, 79 Miss. 639, 31 So. 205 (1901); Gulf & S. I. R. R. v. Singleterry, 78 Miss. 772, 29 So. 754 (1901); McKenzie v. Shows, 70 Miss. 388, 12 So. 336 (1892); Howell v. Bush, 54 Miss. 437 (1877); Taylor v. Smith, 54 Miss. 50 (1876); State Nat. Bank of La. v. Lyons, 52 Miss. 181 (1876); Collins v. Collins, 51 Miss. 311 (1875).

[116]Miss. Code Ann. (1930) § 1775; Stuart v. Kennedy, 145 Miss. 728, 110 So. 847 (1927); Jarvis v. Armstrong, 94 Miss. 145, 48 So. 1 (1909); Billinglsey v. Niblett, 56 Miss. 537 (1879).

[117]Miss. Code Ann. (1930) § 1775; Chatman v. Poindexter, 101 Miss. 496, 58 So. 361 (1912); Mitchener v. Robins, 73 Miss. 383, 19 So. 103 (1895).

assessments and sales therefore[118] and judgments on forfeited recognizances and bail bonds.[119] Then, too, the husband can transfer the homestead by will[120] and such transfer is not affected by the statute[121] regulating the descent of the homestead.[122]

The husband had no vested right in the property owned by him, as to the manner of its conveyance; and the statute requiring the signature of his wife did not impair any vested right, although he owned the land in fee prior to the passage of the act.[123] He is not the general agent of the wife and he cannot defeat her homestead interest in the land unless lawfully authorized by her.[124] But a trust deed given by the husband on the homestead before marriage may be renewed by a new promise by the husband alone,[125] and the signature of the wife is not necessary where the deed of trust is solely on the crops to be grown on the homestead.[126] There must be a common and contemporaneous assent on the part of the spouse to the conveyance of the homestead, but a deed is not void because the wife signed it eight months after the husband did, if, in fact, there was present at the time a common and contemporaneous assent.[127] Where the husband executes a mortgage on the homestead and the wife does not sign it, her subsequent conveyance of her interest in the land to the mortgagee, without her husband's consent, imparts no validity to the mortgage.[128] A deed to a homestead, executed by the husband alone, is void, even though the wife is one of the grantees.[129] But a husband may make a valid deed to his wife of the property or title to the homestead without her joining in the conveyance, but such deed will not defeat the husband's right to occupy it as a home and his right cannot be impaired so long as the place is used as a homestead.[130] And where a deed of trust, executed by husband and wife, provides that it is to secure any farther amounts that might be advanced them, the provision refers to both mortgagors and, hence, a note on which husband was principal was not secured, since wife's consent was necessary to enlargement of the debt secured thereunder.[131]

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[118]Miss. Code Ann. (1930) § 1775.
[119]*Ibid.*
[120]Marx v. Haley, 92 Miss. 113, 45 So. 612 (1908).
[121]Miss. Code Ann. (1930) § 1410.
[122]Osborn v. Sims, 62 Miss. 429 (1884); Norris v. Callahan, 59 Miss. 140 (1881); Turner v. Turner, 30 Miss. 428 (1855).
[123]Massey v. Womble, 69 Miss. 347, 11 So. 188 (1891).
[124]Foote v. Hambrick, 70 Miss. 157, 11 So. 567 (1892); Partee v. Stewart, 50 Miss. 717 (1874).
[125]Hambrick v. Jones, 64 Miss. 240, 8 So. 176 (1886).
[126]Vaughan v. Powell, 65 Miss. 401, 4 So. 257 (1888).
[127]Howell v. Hill, 94 Miss. 566, 48 So. 177 (1909).
[128]Duncan v. Moore, 67 Miss 136, 7 So. 221 (1889).
[129]Smith v. Stanley, 159 Miss. 720, 132 So. 452 (1931); Chatman v. Poindexter, 101 Miss. 496, 58 So. 361 (1912).
[130]Williams v. Green, 128 Miss. 446, 91 So. 39 (1922).
[131]Davis v. Cranford, 175 Miss. 493, 168 So. 261 (1936).

(b) After Separation of Husband and Wife.

It will be remembered that our statutes require the signature of the husband or wife if he or she "be married and living with" his or her spouse.[132] Accordingly, it has been held that a husband who has driven his wife from his home and refuses to permit her to return, cannot lawfully convey the property without the wife's joining in the conveyance,[133] the Court there saying that "So long as the wife has the right and the will to remain at home, she is, in our opinion, to be considered as there living within the meaning of the statute." So also it seems the husband is living with the wife, within the meaning of the statute, unless he has ceased to live with her with intent never to return.[134] However, where the wife leaves the husband voluntarily and not through coercion and refuses to return to live with him, the husband's conveyance of the homestead without the wife's signature is valid.[135] In a case in which a wife signed a separation agreement without coercion and separation followed, the husband's deed to the homestead was valid.[136] And where the wife is away from her husband and abandons intention to return, she no longer has any power over the homestead; and the deed executed by the husband alone is valid.[137]

IX. *Rights of Surviving Husband, Wife, Children or Heirs*

Our statute provides the manner in which the exempt real and personal property shall descend on the death of the owner.[138] The exempt property is no part of the estate to be administered, but descends directly under the statute.[139] But the statute has no application on the descent of the property if it be disposed of by will.[140] The heirs take the property as tenants in common,[141] and the statute is to be liberally construed.[142] The widow has the right to occupy the homestead during her widowhood[143]

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[132]MISS. CODE ANN. (1930) §§ 1778, 1780.

[133]Scott v. Scott, 73 Miss. 575, 19 So. 589 (1895); overruled on other grounds by Columbian Mutual Life Ins. Co. v. Jones, 160 Miss. 41, 133 So. 149 (1931); and also by McDonald v. Sanford, 88 Miss. 633, 41 So. 369 (1906).

[134]Walton v. Walton, 76 Miss. 662, 25 So. 166 (1898).

[135]Sylvester v. Stevens, 186 Miss. 503, 191 So. 483 (1939); Lewis v. Ladner, 177 Miss. 473, 172 So. 312 (1937).

[136]Lewis v. Ladner, 177 Miss. 473, 172 So. 312 (1937); Board of Mayor & Aldermen v. Clayton, 155 Miss. 428, 124 So. 490 (1929).

[137]Philan v. Turner, 13 So. (2d) 819 (Miss. 1943); Lewis v. Ladner, 177 Miss. 473, 172 So. 312 (1937).

[138]MISS. CODE ANN. (1930) §§ 1410, 1411, 1412, 1413.

[139]Taylor v. Smith, 54 Miss. 50 (1876); Wally v. Wally, 41 Miss. 657 (1868); Holliday v. Holland, 41 Miss. 528 (1867); Whitley v. Stevenson, 38 Miss. 113 (1859).

[140]Kelly v. Alred, 65 Miss. 495, 4 So. 551 (1888); Osburn v. Sims, 62 Miss. 429 (1884); Norris v. Callahan, 59 Miss. 140 (1881); Turner v. Turner, 30 Miss. 428 (1855).

[141]MISS. CODE ANN. (1930) § 1410; Falkner v. Thurmond, 23 So. 584 (Miss. 1898); Hickman v. Ruff, 55 Miss. 549 (1878).

[142]Lackey v. Harrington, 162 Miss. 512, 139 So. 313 (1932).

[143]MISS. CODE ANN. (1930) § 1412; Lackey v. Harrington, 162 Miss. 512, 139

and is entitled to use and occupy it free from liability for rent or hire and from partition during her widowhood.[144] This is true to the extent of his title, even though the husband owned only an equitable title in the property;[145] and she takes a child's part in fee if the husband owned the land in fee.[146] But the term "children" in Section 1410 of the Code of 1930, providing that a homestead shall descend to the children of decedent by a former marriage in case there are no children by the second marriage, and the survivor owns a place of equal value with the homestead, does not include grandchildren who, though they have been supported by decedent as a part of his family, cannot claim the homestead as against the second wife, who has a place of her own, equal in value to the homestead.[147] The widow has the right to occupy the homestead as against the purchaser at tax sale of the interest of a co-tenant.[148] The purpose of the statute providing for homestead exemption and providing that exemption shall not be lost by disposal of property is to give the surviving husband or wife the benefit of the exemption if the survivor was over sixty years of age at the time of the death of the other spouse, and to give the right to retain the proceeds of sale of the homestead, should it be best to sell it.[149]

It was formerly held[150] that the wife during the lifetime of her husband had no such interest in the homestead as entitled her to appeal to a court of equity for protection, but these cases have been overruled since 1931; and a wife now has an interest in the homestead which allows her to invoke the aid of a court of equity for protection.[151]

X. *Amount, Extent, and Value*

The amount, extent and value of the homestead, cast upon the exemptionist's heirs, are measured as at the time of the exemptionist's death and no subsequent appreciation or depreciation in value may change the allotment.[152] During the lifetime of the exemptionist, the valuation at the

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So. 313 (1932); Stevens v. Wilbourn, 88 Miss. 514, 41 So. 66 (1906); Martin v. Martin, 84 Miss. 553, 36 So. 523 (1904).

[144]Miss. Code Ann. (1930) § 1412; Bohn v. Bohn, 193 Miss. 122, 5 So. (2d) 429 (1942); Lackey v. Harrington, 162 Miss. 512, 139 So. 313 (1932); Dickerson v. Leslie, 94 Miss. 627, 47 So. 659 (1908); Stevens v. Wilburn, 88 Miss. 514, 41 So. 66 (1906); Moody v. Moody, 86 Miss. 323, 38 So. 322 (1905); Martin v. Martin, 84 Miss. 553, 36 So. 523 (1904).

[145]Warren v. Davis, 90 Miss. 336, 43 So. 604 (1907).

[146]Bohn v. Bohn, 193 Miss. 122, 5 So. (2d) 429 (1942); Warren v. Davis, 90 Miss. 336, 43 So. 604 (1907).

[147]Peeler v. Peeler, 68 Miss. 141, 8 So. 392 (1890).

[148]Lackey v. Harrington, 162 Miss. 512, 139 So. 313 (1932).

[149]Bank of Myrtle v. Garrison, 183 Miss. 526, 184 So. 291 (1938).

[150]Scott v. Scott, 73 Miss. 575, 19 So. 589 (1896); Thoms v. Thoms, 45 Miss. 263 (1871).

[151]Felder v. McCormick, 191 Miss. 851, 4 So. (2d) 363 (1941); Columbian Mutual Life Ins. Co. v. Jones, 160 Miss. 41, 133 So. 149 (1931).

[152]Moody v. Moody, 86 Miss. 323, 38 So. 322 (1905); Parisot v. Tucker, 65 Miss. 439, 4 So. 113 (1888).

time of the allotment of the homestead prevails;[153] and if the part allotted thereafter increases or decreases in value, a new allotment may be made so as to keep the property within the limits of the law.[154] The excess in value over the statutory limit is, of course, liable for debts and constitutes no part of the homestead under this statute.[155] Consequently, the excess over the homestead may be sold by the husband without the signature of the wife.[156] If there be a conveyance of the homestead by the husband alone and the homestead exceeds the statutory limit, the procedure is to appoint commissioners and allot the homestead under the provisions of the statute;[157] and the court has no power to allot the homestead except in the manner provided by the statute,[158] and the exemptionist cannot make a selection of homestead in a manner different thereto.[159] But the homestead must be claimed by the exemptionist or it will be waived.[160] The limit of value ($3,000) controls for the benefits of creditors, to prevent unreasonable amounts from being held exempt from execution. But the question of value has no place in the consideration of the rights of the surviving widow to use and occupy the homestead.[161] The widow is entitled, as between her and the heirs, to have 160 acres of land containing the dwelling house set aside to her regardless of value.[162]

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[153]Miss. Code Ann. (1930) §§ 1765, 1766, 1770, 1771, 1772, 1773, 1774; Parisot v. Tucker, 65 Miss. 439, 4 So. 113 (1888).

[154]Parisot v. Tucker, 65 Miss. 439, 4 So. 113 (1888).

[155]Marx v. Haley, 92 Miss. 113, 45 So. 612 (1907).

[156]Nixon v. Hewes, 80 Miss. 93, 31 So. 899 (1902); Howell v. Bush, 54 Miss. 437 (1877); National Bank v. Lyons, 52 Miss. 181 (1876).

[157]Miss. Code Ann. (1930) §§ 1770, 1771, 1772; Robert G. Bruce Co. v. Spears, 181 Miss. 786, 181 So. 333 (1938); Howell v. Bush, 54 Miss. 437 (1877).

[158]Miss. Code Ann. (1930) §§ 1771, 1772; Robert G. Bruce Co. v. Spears, 181 Miss. 786, 181 So. 333 (1938); Willis v. Allen, 131 Miss. 264, 95 So. 435 (1923).

[159]Robert G. Bruce Co. v. Spears, 181 Miss. 786, 181 So. 333 (1938); Ferguson v. Ferguson, 5 So. 514 (Miss. 1889).

[160]Henderson v. Still, 61 Miss. 319 (1883).

[161]Dickerson v. Leslie, 94 Miss. 627, 47 So. 659 (1908); Moody v. Moody, 86 Miss. 323, 38 So. 322 (1905).

[162]Bohn v. Bohn, 193 Miss. 122, 5 So. (2d) 429 (1942); Dickerson v. Leslie, 94 Miss. 627, 47 So. 659 (1908); Moody v. Moody, 86 Miss. 323, 38 So. 322 (1905). See Note (1941) 13 Miss. L. J. 427, 462 (lease of homesteads for oil and gas); Arant, *Homestead Tax Exemption in Mississippi* (1938) 11 Miss. L. J. 167.

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BOOK REVIEW

LAWFUL ACTION OF STATE MILITARY FORCES. By Edmund Ruffin Beckwith, James G. Holland, George W. Bacon, and Joseph W. McGovern, with a foreword by Lieutenant General Hugh A. Drum. New York: Random House, 1944. Pp. xviii, 216.

The authors are well qualified to write this volume. Lieutenant Colonel Beckwith was for many years an officer in the Judge Advocate General's Department, Reserve, United States Army, before he became the Judge Advocate of the New York Guard. Major Holland is an assistant judge advocate of the New York Guard. The foreword is written by Lieutenant General Drum, distinguished officer of the United States Army, who, since his retirement, has been in command of the New York Guard. Messrs. Bacon and McGovern are teachers of law in Fordham University School of Law. The book has been prepared by men who combine years of experience as judge advocates, teachers of law, and practicing lawyers.

In *Lawful Action of State Military Forces* the powers and duties of state troops are defined. Here for the first time are found codified the rights and responsibilities of our militia in war or in domestic disturbances. Authoritative information is given for use and guidance to the officers and men of the military establishments of the states. Consideration is given to the most practical means of maintaining peace and security, while insuring the liberties and the welfare of the citizens of the state.

Since the state guards are purely state troops, there was a need for a book dealing with their legal powers and status. These troops were raised to take the place of the National Guard, now wholly in federal service. The function of the state guards is to put down disorders beyond the power of the police to suppress.

The greater part of the book deals with subjects concerned with the suppression of domestic disturbances. There are many legal problems which will confront state forces when they are on duty in connection with domestic disturbances. This book will be of the greatest value to officers, noncommissioned officers, and enlisted personnel when on such duty. The authors themselves point out in the introduction to this volume that "This book is concerned with the citizen-soldier of a state when in time of peril he is called upon to perform military duty at home among his fellow citizens. It deals with his lawful powers, and the restrictions on them, when he must discharge the responsibilities of a soldier in the midst of his own people."

Although the principles of the American constitutional system, both federal and state, are based upon the assumption that the civil authority shall always be supreme, "the Fathers" knew that the state must contain within itself the means of securing its own preservation. A well-regulated militia is considered necessary to the security of a free state. The action of state forces must always be governed by the law of the land.

To quote the authors: "All the rules of permissible action when state troops are on domestic duty are referable to this standard, so that in contrast to the unlimited violence which the soldier metes out to foreign foes his action at home is always restrained by the civil law."

The last chapter of the book deals with military justice. It is of necessity brief, if not sketchy, covering forty-seven pages. Actually it is a condensation of *A Manual for Courts-Martial,* which should be close at hand for any officer or other person interested in a serious study of the general subject of lawful action of state military forces.

This book is available in a paper-bound edition, containing the text without footnotes or other obstacles to easy reading, handy for the soldier upon a mission. The cloth-bound edition carries the annotations and other apparatus for the benefit of civil officials, legislators, judge advocates, and practicing lawyers. There is a supplement to the cloth-bound edition containing useful forms, and also a list of topics relating to the personal rights of officers and men, which of necessity vary greatly among the several states.

This volume is valuable for all who are interested in a clear statement of the functions and the rights and duties of state military forces.

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NOTES AND COMMENTS

BUSINESS ENTRIES IN MISSISSIPPI

In proving a business transaction it is, of course, always desirable to have the testimony, from personal knowledge, of the persons who carried out the transaction. However, such persons may have forgot the details of the transaction by the time of the trial. In such a case, it has been held that the witness may use his business books for the purpose of stimulating and improving a present recollection.[1] These books do not become part of the witness' testimony and therefore need not be made by the witness,[2] nor be originals.[3] Neither do they have to be made at the time of the transaction.[4]

However, if the books do not give the witness any recollection of the transaction, they may then be offered as records of the witness' past recollection recorded.[5] The witness will be required to authenticate the records and may be cross-examined concerning them. Since the entries will become formal pieces of evidence and may go as testimony to the jury,[6] certain "precautions for securing the adequacy of the recollection and the accuracy and identity of the memorandum"[7] must be observed. The entries must have been made when the transaction was fairly fresh in the mind of the witness.[8] He must be able to say that he thought the entry was correct at the time he made it, but he may rely upon a habit of correctness.[9] He must be qualified by personal knowledge of the matter.[10] If procurable, the original entry should be introduced.[11]

If the person who made the entries is unavailable or unable to testify, still it may be desirable to rely upon the business entries. In such a case,

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[1]"When the party is a witness they may be used as a means of refreshing his memory and only become evidence themselves in those cases in which, having examined the entries for the purpose of refreshing his memory, he is still unable to remember the facts." Bookout v. Shannon, 59 Miss. 378 (1882). *See* Neff v. Neff, 96 Conn. 273, 114 Atl. 126 (1921); 3 WIGMORE, EVIDENCE (3d ed. 1940) § 758.

[2]Taft v. Little, 178 N. Y. 127, 70 N. E. 211 (1904); Nelson & Wallace v. Gibson, 90 Vt. 423, 98 Atl. 1006 (1916) (memorandum book used to refresh memory not open to objection that witness did not know of his own knowledge that entries were correct when made); 3 WIGMORE, *op. cit. supra* note 1, § 759.

[3]Finch v. Barclay, 87 Ga. 393, 13 S. E. 566 (1891); Hudnutt v. Comstock, 50 Mich. 596, 16 N. W. 157 (1883) (recollection may be refreshed from bill of particulars which is duplicate of account).

[4]3 WIGMORE, *op. cit. supra* note 1, § 761.

[5]*Id.* §§ 734, 737, n. 2.

[6]In Alabama & V. Ry. v. Sol Fried Co., 81 Miss. 314, 33 So. 74 (1902), the court held that a memorandum, made from two different sets of books showing the weight and grade of some cotton which had been burned, could be used by witnesses to refresh their recollections and later laid before the jury for their information and assistance. 3 WIGMORE, *op. cit. supra* note 1, § 754.

[7]WIGMORE, CODE OF EVIDENCE (2d ed. 1935) Rule 93.

[8]State v. Williams, 94 Vt. 423, 111 Atl. 701 (1920); 3 WIGMORE, EVIDENCE (3d ed. 1940) § 745.

[9]3 WIGMORE, *op. cit. supra* note 8, § 746.

[10]*Id.* § 747.

[11]*Id.* § 749.

the entries, subject to certain conditions, may be introduced as an exception to the hearsay rule. This exception embraces two distinct, although often confused, branches. The first, admitting books of regular entries, made in the course of business, by a party to the action, whether or not such party is available as a witness, is generally called the "shop-book" or "parties' account book" rule. It sanctions a narrower class of regular entries than does the second, which admits in evidence the entries of accounts made by third persons, in the regular course of business, freshly after the transaction, when the entrant is dead or otherwise unavailable for testimony in court. This branch is usually called the exception in favor of regular business entries.

Parties Account Book Exception. As early as 1600, there appeared to be in England a custom of receiving in evidence shop-books of parties to the action whether or not the entrant was available or the books were kept by the entrant himself or by a clerk.[12] Because of the abuse of this custom, in 1609, a statute[13] was passed which limited the use of these books to transactions which occcured within one year of the action, or where a bill of debt existed.[14] After the 1600's the books of a party ceased to form the subject of a hearsay exception at common law in England and they were admitted only under the statutory rules of the late 1800's.[15]

By the time the English decisions, excluding a party's own entries, became generally known in America, the law admitting these entries was firmly established here and too useful to be overruled.[16] Thus, the shop-book rule as applied in the United States is a departure, rather than a derivation, from the rule of the common law, after 1600, that the books of a party to be admissible must have been kept by a clerk or other disinterested person.[17]

Originally the American shop-book rule was based upon a double ground of necessity, i. e., the disqualification of the party to take the stand as a witness and his usual lack of any other evidence than his own books to prove his claim.[18] Shortly after the Revolution, the shop-book rule appeared in two distinct forms or variations, the New York and the New England rules.[19] Under the New York rule a foundation for the introduction of the books must be laid by proving that the party had no clerk, that some of the articles had actually been delivered, that the books were

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[12] 5 *id.* § 1518.

[13] 1609, St. 7, Jac. I, c. 12, continued by St. 3, Car. I., c. 4, § 22; St. 16, Car. I, c. 4; Rev. St. I, 691.

[14] Radtke v. Taylor, 105 Ore. 559, 210 Pac. 863 (1922); 5 WIGMORE, *op. cit. supra* note 8, § 1518.

[15] 5 WIGMORE, *op cit. supra* note 8, § 1518.

[16] Radtke v. Taylor, 105 Ore. 559, 210 Pac. 863 (1922); Vosburgh v. Thayer, 12 Johns. 461 (N. Y. 1815).

[17] Radtke v. Taylor, 105 Ore. 559, 210 Pac. 863 (1922).

[18] Pratt v. White, 132 Mass. 477 (1882); Vosburgh v. Thayer, 12 Johns. 461 (N. Y. 1815).

[19] Radtke v. Taylor, 105 Ore. 559, 569, 210 Pac. 863, 868 (1922).

the account books of the party to the action and that he kept fair and honest accounts.[20] The suppletory oath, the distinguishing feature of the New England form, was not required or allowed.[21] By the New England rule a party's books of account were admissible if they passed the inspection of the court and were supported by the suppletory oath of the party to the effect that they were his accounts, made about the time of the transaction, originals, correctly kept, that the goods had been delivered, and that the sums charged had not been paid.[22]

In the Mississippi case of *Bookout v. Shannon*[23] a physician, in an action to recover for professional services rendered, offered in evidence his account books, but did not offer any suppletory evidence whatever. The defendant objected to the introduction of the book on the ground, among others, that the book was not identified or shown to be the book of accounts kept by the plaintiff in his business beyond what the book itself showed. The Supreme Court reversed the judgment for the plaintiff on the ground of error committed in admitting the book without suppletory proof, saying,

> "We do not understand that the book alone, unsupported by any oath of the party, *or* other evidence, is sufficient proof of its own competency, however orderly may be the appearance of its entries."[24]

The court further said that the books when themselves not objectionable might be admitted as evidence of the account when the party introduced evidence satisfactory to the judge to show that the books were his books of account containing contemporaneous entries. Thus, it would seem that in Mississippi a party's account books might be admissible either under the New England or the New York rule; that is, the party might introduce the books by making his suppletory oath as to their correctness, or he might introduce other evidence to show that they were his books and correctly kept, without making an oath. However, in earlier cases it had been said that such books would be admissible upon proof that the owner was in the habit of keeping correct books.[25] The Mississippi Supreme Court seems to have failed to distinguish between the requirements as set forth by the two rules, but to have admitted the books either on suppletory oath or extrinsic evidence as to their correctness.

In time the requirements for the admission of the shop-books became rather fixed under both forms of the rule. Originally the party must

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[20]Vosburgh v. Thayer, 12 Johns. 461 (N. Y. 1815).

[21]"We do not require or allow his oath, a practice I believe peculiar to this State and that of New Jersey." Sickles v. Mather, 20 Wend. 72, 32 Am. Dec. 521, 523 (N. Y. 1838).

[22]Union Bank v. Knapp, 3 Pick. 96, 15 Am. Dec. 181 (Mass. 1825).

[23]59 Miss. 378 (1882).

[24]*Id.* at 383.

[25]Moore v. Joyce, 23 Miss. 584 (1852); Hazlip v. Leggett, 6 S. & M. 326 (Miss. 1846).

have been his own bookkeeper and could have had no clerk,[26] for if he had one the clerk could be called if living, or if deceased, his book entry could be introduced as a regular entry in the course of business. Later the rule appears to have been broadened to admit the books of a party to the action where the entries were made by his agent or clerk.[27] The Mississippi Supreme Court has not limited the application of the parties' account book rule to the case where the party had no clerk. In *Greene v. Greene,*[28] the entrant, the plaintiff's bookkeeper, was present and testified to the fact that the books were regularly and correctly kept in the due course of business. The court held that the accounts were admissible in favor of the owner of the accounts, and might be sufficient proof of the debts, although no one testified to the sale of the specific articles charged.

As a general rule, shop-books are inadmissible to evidence cash transactions.[29] However, it has been held in Mississippi that where a merchant customarily had advanced supplies and cash to the defendant and his employees, charging the cash on the books in the same way that the goods were charged, the books were admissible to prove the cash items as well as the sale of the supplies.[30] The court quoted Wigmore as indicating perhaps the proper limitation:

> "The better opinion is that while, as a general rule such entries are not to be regarded as admissible, yet in particular cases the ordinary course of business may involve cash entries and they may then be used."[31]

In this instance the Mississippi Supreme Court appears to have taken a realistic attitude toward the problem of admitting shop-books to prove cash transactions. If the cash entries are made in the regular course of business at the time of the transaction the same probabilities of trustworthiness are present as in the case of entries involving goods or services and the same reasons of necessity and convenience argue for their admission.

Books of account are not admissible to prove a transaction to which a third person could testify, as to show that sale of goods to another on the defendant's order.[32] In the Mississippi case of *Barner v. Rule,*[33] the

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[26]Sickless v. Mather, 20 Wend. 72, 32 Am. Dec. 521 (N. Y. 1838) (foreman who delivers goods, making memorandum of delivery on slate from which account book transcribed, is not a clerk); Vosburgh v. Thayer, 12 Johns. 461 (N. Y. 1815).

[27]5 WIGMORE, *op. cit. supra* note 8, § 1538.

[28]145 Miss. 87, 110 So. 218 (1926).

[29]Barner v. Rule, 116 Miss. 600, 77 So. 521 (1918). See Finley v. Armstrong, 117 Miss. 289, 78 So. 177 (1918), where it was held that cash items entered in the regular course of business were properly chargeable upon the books and that such books were evidence to establish these charges.

[30]5 WIGMORE, *op. cit. supra* note 8, § 1539.

[31]*Id.* § 1549.

[32]Mansfield v. Gushee, 120 Me. 333, 114 Atl. 296 (1921); 5 WIGMORE, *op. cit. supra* note 8, § 1540.

[33]116 Miss. 600, 77 So. 521 (1918).

account contained charges of cash paid to third parties for the defendant. These accounts were excluded by the trial court and the Supreme Court on appeal in refusing to reverse on this ground held that the weight of this evidence was for the determination of the chancellor. Ordinarily books of account are not admissible[34] to prove the terms of a special contract or of a large transaction.[35] Furthermore, the occupation of the party must be one in which it is proper to keep books of account.[36]

To satisfy the requirement of trustworthiness the entries in the books must be made in the regular course of business[37] as a part of a regular series of entries,[38] made contemporaneously with the transaction.[39] The entrant must have a reputation for honest bookkeeping[40] and the book must bear an honest appearance.[41] The question of the competency of the book must be determined by its appearance and character, but when the party introduces evidence to show that the book is his book of account containing entries contemporaneous with the transaction under investigation and the book itself is not objectionable and apparently fair, it may be admitted as evidence of the debt.[42]

Regular Business Entries Exception. In England during the early part of the seventeenth century, the entries of a deceased clerk began to be admitted, and in 1832 in the case of *Doe v. Turford*[43] the general exception covering the admission of entries made by a person, now deceased, in the regular course of business was recognized. Up to 1800, in America, there was no use of regular entries except those which could be admitted under the parties' account book rule. However, in two cases[44] in the early part

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[34]Collins v. Shaw, 124 Mich. 474, 83 N. W. 146 (1900); 5 WIGMORE, *op. cit. supra* note 8, § 1541.

[35]5 WIGMORE, *op. cit. supra* note 8, § 1543.

[36]Haynes v. Nat'l Surety Co., 169 Miss. 676, 153 So. 515 (1934) (ledger sheets of bank); Barner v. Rule, 116 Miss. 600, 77 So. 521 (1918) (books of merchant); Bookout v. Shannon, 59 Miss. 378 (1882) (doctor's account book).

[37]"Testimony that books were made up in the regular course of business and were correctly kept renders them admissible." Greene v. Greene, 145 Miss. 87, 110 So. 218 (1926); 5 WIGMORE, *op. cit. supra* note 8, §§ 1547-48.

[38]In Carter v. Catchings, 48 So. 515 (Miss. 1909), a page taken from a ledger on which appeared a single pencil entry was held inadmissible apparently on the ground that it was not shown to be an entry made in a regular series. See 5 WIGMORE, *op. cit. supra* note 8, § 1549.

[39]Chicago, St. L. & N. O. Ry. v. Provine, 61 Miss. 288 (1883) (made at or about the time when the facts entered transpired); State v. Yerger, 74 Mont. 126, 238 Pac. 603 (1925); 5 WIGMORE, *op. cit. supra* note 8, § 1550.

[40]5 WIGMORE, *op. cit. supra* note 8, § 1552.

[41]"Competency is determined by the appearance and character of the books, regard being had to the education of the party, the nature of his employment, the manner of his charges, and all the circumstances of the case." Moody v. Roberts, 41 Miss. 74, 76 (1886).

[42]Bookout v. Shannon, 59 Miss. 378 (1882).

[43]3 B. & Ald. 890 (K. B. 1832).

[44]"We think it a safe principle that memorandums made by a person in the ordinary course of business, of acts or matters which his duty in such business requires him to do for others, in case of his death, are admissible evidence of the acts and matters so done." Nicholls v. Webb, 21 U. S. 326, 8 Wheat. 326, 5 L. ed. 628 (1823); Welsh v. Barrett, 15 Mass. 380 (1819).

of the 1800's the principle of admitting regular entries in the course of business by persons now deceased was recognized. This principle was later enlarged in the United States, but not in England, to admit the entries when the entrant was still living, but in some other way unavailable to testify.[45]

The regular business entries exception to the hearsay rule admits into evidence the "entries of acts or occurrences made regularly in the course of one's occupation, freshly after the event, when the entrant is deceased or otherwise unavailable for testimony in court."[46] Thus it is seen that the first requirement is that the entrant be unavailable, for if he is available there is usually no reason to allow the introduction of the accounts as evidence of themselves. The general rule is that the entrant is considered unavailable when he is either deceased, disqualified by insanity or otherwise, or out of the jurisdiction of the court.[47] This requirement of the unavailability of the entrant was recognized in Mississippi in one of the earliest cases[48] on the subject where the court said, "When direct proof of a claim for goods sold or for services rendered cannot be made by the oath of the party or of other witnesses, the books of account of the party are admissible."[49] In this case the court recognized as grounds for admitting the books the death of the entrant, or his removal beyond the process of the court.

To be admissible, the entries must have been made in the regular course of the business[50] or, as the Mississippi court has phrased it, "in the due course of business."[51] They will not be evidence of any charge not within the regular course of business of the party offering them.[52]

The entries offered in evidence must be one of a series of entries, not a casual or isolated one.[53] The Mississippi Supreme court has defined an account book as a volume bound or sewed together in which accounts are regularly kept[54] and has refused to admit a page taken from the plaintiff's

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[45]McDonald v. Carnes, 90 Ala. 147, 7 So. 919 (1890) (indefinite absence from state); Bridgewater v. Roxbury, 54 Conn. 217, 6 Atl. 415 (1886) (insanity); Griffin v. Boston & M. Ry., 87 Vt. 278, 89 Atl. 220 (1913) (illness).

[46]WIGMORE, CODE OF EVIDENCE, (2d. ed. 1935) Rule 155; *see* 5 WIGMORE, EVIDENCE (3d. ed. 1940) §§ 1518, 1519, 1522.

[47]See cases cited *supra* note 45.

[48]Moody v. Roberts, 41 Miss. 74 (1886).

[49]*Id.* at 77.

[50]Nicholls v. Webb, 8 Wheat. 326 (U. S. 1823); 5 WIGMORE, *op. cit. supra* note 8, § 1523.

[51]Greene v. Greene, 145 Miss. 87, 110 So. 218 (1926).

[52]Moody v. Roberts, 41 Miss. 74 (1886); *see* Ellis v. Ellis, 160 Miss. 345, 134 So. 150 (1930).

[53]United States v. Singer, 58 F. (2d) 74 (C. C. A. 3d, 1932); 5 WIGMORE, *op. cit. supra* note 8, § 1525.

[54]The entry must be in a book of accounts and not merely a collection of loose and indeterminate memoranda. Although entries in a modern book of detachable leaves are admissible, these leaves must be of such appropriate uniformity of materials as to constitute in a reasonable sense the leaves of the account book in which they are kept. W. T. Raleigh Co. v. Rotenberry, 174 Miss. 319, 164 So. 5 (1935).

intestate's ledger on which there appeared an entry in pencil showing a payment by the defendant and a balance due.[55] However it has been held that a single sheet of memorandum showing the number of trees cut by a witness might be introduced under the business entries exception.[56]

The entry must have been made near enough to the time of the event for the entrant's recollection to be trustworthy.[57] To authorize the introduction of business books as evidence of the facts entered therein, it must be shown that the entries were made in the usual course of business at or about the time when the facts entered transpired.[58] Thus, it has been held that a memorandum made two years after the time of the transaction and *post litem* was inadmissible as evidence of the items it contained.[59]

The general principle of evidence, requiring that the person whose statement is received as testimony should speak from personal observation and knowledge,[60] is ordinarily applied in the case of regular entries in the course of business.[61] If the entrant personally observed the transaction recorded and his absence is accounted for, no objection will arise.[62] However, if the entrant had no personal knowledge of the correctness of the transaction as recorded, but made the entry from information furnished him by another, who had personal knowledge of the transaction, is the element of personal knowledge adequately supplied in the absence of the testimony of the latter? There has been considerable conflict among the decisions of the various state courts on this question. Mississippi appears to be with the majority in holding that such books will be admissible although the entrant did not have personal knowledge of the transaction as recorded, provided the inconvenience of producing the persons who had personal knowledge of the transaction would probably outweigh the utility of doing so.[63]

In the case of *Chicago, St. L., & N. O. Ry. v. Provine,*[64] the plaintiff attempted to introduce a cotton shipping book, the entries in which had been made by a large number of employees. Some of these employees testified that the entries were not always made from their personal knowledge of the facts, but from reports made to them by others. It did not

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[55]Carter v. Catchings, 48 So. 515 (Miss. 1909).

[56]Leavenworth & Son, Inc. v. Hunter, 150 Miss. 245, 116 So. 593 (1928).

[57]Lebrun v. Boston & Me. Ry., 83 N. H. 293, 142 Atl. 128 (1928); 5 WIGMORE, *op. cit. supra* note 8, § 1526.

[58]Chicago, St. L. & N. O. Ry. v. Provine, 61 Miss. 288 (1883).

[59]New Orleans, J. &. G. N. Ry. v. Echols, 54 Miss. 264 (1876).

[60]3 WIGMORE, *op. cit. supra* note 8, §§ 615, 657.

[61]5 *id.* § 1530.

[62]In Illinois C. R. R. v. Butterfield Lumber Co., 95 Miss. 357, 49 So. 179 (1909), the entrant was not called to show that the books were correctly kept, nor was his absence explained. The court held that the books were inadmissible since there was no competent proof of their correctness.

[63]In Hayes v. Nat'l Surety Co., 169 Miss. 676, 153 So. 515 (1934), the court held that ledger sheets of a bank were sufficiently authenticated by the testimony of a witness who had assisted in keeping them without the testimony of the other entrants.

[64]61 Miss. 288 (1883).

appear that the persons communicating the facts had personal knowledge of their existence or that it was their business to make the transactions. The court held that this book was inadmissible, stating that it must be shown that the entries were "made by a party having knowledge of the facts entered, or that information thereof was communicated to the party by whom the entries were made by some person engaged in the business whose duty it was to transact the particular business and make report thereof for entry on the books."[65] It would seem that in this case neither the entrant nor the persons who communicated the facts to him had personal knowledge of their existence, nor was it their business to transact these matters.

In a later case,[66] it was urged that under the authority of the *Provine* case certain books offered in evidence by the plaintiff were inadmissible because the witnesses who testified as to their correctness did not make the entries. These books were those of a public weigher and picker and the plaintiff's books based upon the first two. The plaintiff's bookkeeper was out of the jurisdiction, but the plaintiff testified that the books were correctly kept and audited. The court held that it was not necessary to qualify the rule in the *Provine* case to hold these books admissible. The court then quoted Wigmore as stating the correct modern rule:

> "Where an entry is made by one person in the regular course of business, recording an oral or written report, made to him by one or more other persons in the regular course of business of a tranaction lying in the personal knowledge of the latter there is no objection to receiving that entry under the present exception, provided the practical inconvenience of producing on the stand the numerous persons thus concerned would in the particular case outweigh the probable utility of doing so."[67]

In this case the persons who transmittted the information to the entrants in the picker's and weigher's books had personal knowledge of the facts they transmitted and it was part of their job to transmit such facts. In the *Provine* case it did not appear that the person so transmitting the facts had any personal knowledge whatever of the facts. It is on this ground that the cases can be distinguished. Consequently they are not contradictory, but are both applications of the general rule that the element of personal knowledge must be supplied somewhere along the line.[68]

The general rule of evidence requiring the production of the original

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[65] *Id.* at 292.

[66] Grenada Cotton Compress Co. v. Atkinson, 94 Miss. 93, 47 So. 644 (1908).

[67] 5 WIGMORE, EVIDENCE (3d ed. 1940) § 1530.

[68] *See* Wooten v. Mobile & O. Ry., 89 Miss. 322, 42 So. 131 (1906), where the clerk who had made the entries, and who had personal knowledge of the facts entered was not called as a witness, nor was his absence accounted for, but the records were placed in evidence with the testimony of another clerk who had not made the entries and who had no personal knowledge of the facts. In a somewhat dubious short statement, the court held that the action of the lower court in admitting these records, "the private records of a private corporation," was erroneous.

document whenever the purpose of the introduction is to prove its terms[69] applies with equal force to the introduction of entries made in the regular course of business.[70] At one time in Mississippi it seemed to be permissible to give in evidence copies of accounts proved by witnesses to have been correctly transcribed from the original books.[71] However, this practice was expressly repudiated in the case of *Moody v. Roberts*,[72] where the court held that copies of entries in the original books were not admissible and said further:

> "There does not seem to be any sound principle upon which such a practice can be sustained. It is going quite far enough to permit the original book itself, after being inspected by the court, and subjected to the scrutiny of the opposite party, to go as evidence to the jury, and in no other way can the credit due to such testimony be properly estimated."[73]

This holding has been followed substantially in the later Mississippi cases.[74]

In the case of *Hauenstein v. Gillespie*,[75] it was held that the original books of account need not be attached to the depositions of persons not parties to the action, but that certified copies would be sufficient, when these original books were produced before the commissioner who took the depositions, and an opportunity given to all concerned to examine these books. The court said that because of the extreme inconvenience of attaching these books to the depositions and because of the unjustness of depriving persons not parties to the litigation of their books for such an extended time, certified copies would be admissible in evidence in the chancery court to the same extent that the original books would be. This case does not necessarily overrule the *Moody* case. Here the books were subjected to the inspection of the commissioner and an opportunity was given to the opposite party to scrutinize them. Since these two requirements were met, the court need not require their production before the court, where practical convenience would outweigh any advantage to be derived from their production.

Hospital records of a patient's treatment have been admitted by some

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[69] 5 WIGMORE, *op. cit. supra* note 67, § 1133.

[70] Where bills of lading are issued in triplicate, all three copies are originals and any one may be introduced in evidence. Panola County Bank v. Nessen Lumber Co., 117 Miss. 583, 78 So. 516 (1918). *See* O'Shea v. United States, 93 F. (2d) 169 (C. C. A. 6th, 1937); 5 WIGMORE, *op. cit. supra* note 67, § 1532.

[71] Moore v. Joyce, 23 Miss. 584 (1852); Simmons v. Means, 8 S. & M. 397 (Miss. 1847); Hazlip v. Leggett, 6 S. & M. 326 (Miss. 1846) (must show that the account sued upon had been correctly copied from the books of original entry).

[72] 41 Miss. 74 (1866).

[73] *Id.* at 78.

[74] Panola County Bank v. Nessen Lumber Co., 117 Miss. 583, 78 So. 516 (1918); Chicago, St. L. & N. O. Ry. v. Provine, 61 Miss. 288 (1883); Dyson v. Baker, 54 Miss. 24 (1876) (original books must be produced or their loss established).

[75] 73 Miss. 742, 19 So. 673 (1896).

courts under the business entries exception to the hearsay rule.[76] In *Metropolitan Life Insurance Co. v. Reinhart*[77] the Mississippi Supreme Court held that hospital records consisting of reports of doctors and nurses showing the result of examinations of a patient should be excluded as hearsay and as a privileged communication. The court did not consider the question of whether the entries might be admitted under the business entries exception, but apparently even if they should hold that they might come in under this exception to the hearsay rule, they would still be excluded as privileged. In a later case,[78] the court held that the physicians of a state hospital for the insane might testify as to their knowledge of a patient's condition obtained by perusal of the hospital records. It was held to be error to exclude their testimony as privileged since a state statute[79] required that records of examinations of patients be kept. The court also said, "The privileged communication statute does not apply where the law itself requires a disclosure of the condition of the patients."[80] Thus it would seem that in Mississippi only those hospital records which are required by law to be kept may be introduced in evidence, and that other private hospital records would be excluded either on the ground of privilege or hearsay.

The Mississippi Supreme Court has not expressly recognized the broader exception to the hearsay rule as embodied in the regular business entries exception, but has consistently referred to the parties' account book rule, repeatedly making exceptions to it and broadening its effect, until the broader exception is almost exclusively applied. In the early *Moody*[81] case, the court speaks of "the circumstances under which the books of account of a party are admissible in his favor,"[82] although the case was clearly one to which the broader exception would apply. The plaintiff had sued on an open account for goods sold and delivered. A clerk of the plaintiff's testified as to the plaintiff's habit of keeping honest and correct books, to the correctness of the books and the copies introduced from them, to the unavailability of the persons who had made the entries, and to the fact of the sale of the goods to the defendant. The court held that the copies were not admissible, but said that the books themselves would be admissible in this case as an innovation in the general principles of evidence, an enlargement in the principles of the common law.[83] The court was apparently attempting to broaden the shop-book rule to allow the introduction of entries where the party kept a clerk, who could testify to the transaction, and did not make the entries himself, but where the entrant was unavailable for testimony before the court. This appears to be the first case in Mississippi which

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[76]Globe Indemnity Co. v. Reinhart, 152 Md. 439, 137 Atl. 43 (1927).
[77]149 Miss. 455, 115 So. 555 (1927).
[78]Motley v. State, 174 Miss. 568, 165 So. 296 (1936).
[79]Miss. Code Ann. (1930) §§ 1536, 4568; Miss. Code Supp. (1938) § 1040.
[80]Motley v. State, 174 Miss. 568, 165 So. 296 (1936).
[81]41 Miss. 74 (1886).
[82]*Id.* at 77.
[83]*Id.* at 78.

applies a form of the regular business entries exception, although under a misnomer. The court here recognized necessity and convenience as the bases of the introduction of the entries and held that they would justify the introduction; saying:

> "Obviously the best and most satisfactory testimony is that of the witnesses by whom the goods were sold. But the facts may not be within the personal knowledge of the party, and his clerks may die or remove beyond the process of the court, or for other reasons it may not be practicable to obtain their testimony."[84]

In a later case[85] where actually the evidence was admissible under the shop-book rule, the *Moody* case is cited as laying down the correct rule governing the production of this character of evidence. The party who made the entries in his own books was incompetent to testify under a statute prohibiting a person from giving testimony against the estate of a deceased person. The court evidently thought that the same exception governed both cases and saw in the *Moody* case no broadening of the rules of evidence.

In the case of *Chicago, St. L. & N. O. Ry. v. Provine*,[86] the plaintiff offered in evidence certain books which had been kept by him in his business as merchant for the purpose of establishing the delivery of some cotton to the defendant. These entries had been made at different times by several of the plaintiff's employees, not all of whom were available for testimony in court. Under the facts, this would seem to be a case for the application of the regular entries exception, but again the court lays down the rule in terms of the parties' account book rule:

> "The rule is that to authorize the introduction of account books as evidence of the facts entered, it must be shown that they have been fairly and honestly kept, that they are the books of a party engaged in the business to which they refer, that the entries were made in the usual course of business, at or about the time the facts entered transpired, that the entries are original and made by a party having knowledge of the facts entered, or that information thereof was communicated to the party by whom the entries were made by some person engaged in the business whose duty it was to transact the particular business and make report thereof for entry on the books, and such report and entry must be made at the time of the occurrence, or before the facts can be supposed to have passed from his recollection."[87]

Proposed Model Statutes. The application of the business entry exception to the hearsay rule and the use of the parties' account book rule

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[84] *Id.* at 76.
[85] Bookout v. Shannon, 59 Miss. 378 (1882).
[86] 61 Miss. 288 (1883).
[87] *Id.* at 292.

have led in many states to the adoption of a confusing mass of technicalities which serve no useful purpose in getting at the truth. In an attempt to correct this situation three proposals have been made in recent years in the shape of a model statute. In 1927, the Commonwealth Fund Committee Draft[88] was adopted. This act is directed principally at the liberalization of the rules for admission of business records made by a number of individuals, and has been enacted by the Federal Congress.[89]

A Uniform Act recommended by the Committee on Evidence Acts of the National Conference of Commissioners on Uniform State Laws appears to be the most likely to lead to uniformity. This proposed act is in part as follows:

> "Section 1. The term business shall include every kind of business, profession, occupation, calling, or operation of institutions, whether carried on for profit or not.
>
> "Section 2. A record of an act, condition or event shall, in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the Court, the sources of information, method and time of preparation were such as to justify its admission."

In 1938, the American Bar Association's Committee on the Improvement of the Law of Evidence recommended the adoption of the above proposal. Mr. Roscoe L. Barrow, in 1937, offered a form of regular entries statute as an improvement on the above two proposals.[90] One or the other of these proposals has been adopted by a number of state legislatures.[91]

Under the American Law Institute Committee on Evidence rule on business entries,[92] which is based upon the act recommended by the Commonwealth Fund Committee, the evidence would be admissible whenever relevant. None of the limitations of the parties' account book rule would apply. Entries of acts, events, and conditions would be admissible. This proposal includes as a business every kind of institution and provides that the person having knowledge of the act, event or condition, either must make the memorandum or must in the course of the business transmit the information for inclusion in the memorandum.

Martha Wilson Gerald.

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[88] *Proof of Business Transactions*, THE LAW OF EVIDENCE: SOME PROPOSALS FOR ITS REFORM (Yale Univ. Press, 1924).

[89] 49 STAT. 1561, 28 U. S. C. A. 695 (1936).

[90] Note, *Business Entries Before the Court* (1937) 32 ILL. L. REV. 334.

[91] *See* 5 WIGMORE, *op. cit. supra* note 67, § 1519.

[92] RESTATEMENT, EVIDENCE (1942) § 514.

THE CARE AND CUSTODY OF CHILDREN IN MISSISSIPPI

I. *Procedure, Jurisdiction, and Venue*

Although the purpose of this paper is primarily to discuss the substantive law in regard to the custody and maintenance of children in Mississippi, a few statements concerning the above preliminary matters are necessary.

There are several instances in which a court may be called upon to determine the custody of children: in a suit for separate maintenance, in a divorce case, upon *habeas corpus* proceedings, guardianship proceedings, or delinquency proceedings.

In a bill for separate maintenance, the court has the power[1] to award the custody of a minor to either parent.

More frequently the court decrees custody in a divorce suit. Section 1421, Mississippi Code of 1930, gives the court adjudging the divorce the power to make all orders touching the care, custody and maintenance of the children of the marriage, and a further power afterwards, upon petition, to change the decree and make from time to time other decrees as the case may require. If the divorce is not granted and the prayer for custody of the children is dependent upon a divorce, it has been held that custody of the children cannot be awarded.[2] However, it should be possible for the court to award custody to either parent under Code Section 1864, provided the prayer for custody is not made dependent upon the divorce decree. But where there is no prayer for custody of the child in a divorce action, it is not clear whether the court has the power to determine the custody of the child. For example, in *Randall v. Randall*[3] there were no pleadings or testimony concerning the minor child before the lower court which had awarded custody. On appeal the court reversed the trial court as to who was entitled to custody, but made no statements as to whether the lower court erred in determining custody where there were no pleadings thereon.

Where the rightful custody of any person is withheld from the person entitled thereto, a writ of *habeas corpus* will lie.[4] In such cases where the parent brings suit for custody against a third party, there is a *prima facie* presumption that the parent is entitled to custody.[5] A person *in loco parentis* also may bring suit for the custody of a child upon proper showing that the parent or guardian has forfeited his rightful claim;[6] but it is proper first to obtain guardianship of the child, and then bring *habeas corpus*. However, the decree of a chancery court making an appointment of guard-

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[1]Miss. Code Ann. (1930) §§ 1863, 1864.
[2]Walker v. Walker, 140 Miss. 340, 105 So. 53 (1925).
[3]28 So. 19 (Miss. 1900).
[4]Miss. Code Ann. (1930) § 1914.
[5]Watts v. Smylie, 116 Miss. 12, 76 So. 684 (1917).
[6]Miss. Code Ann. (1930) § 1865.

ianship cannot be collaterally attacked on *habeas corpus*, for chancery alone has the power to determine custody of a child and its estate.[7] After awarding custody on *habeas corpus*, the judge is without power to direct the manner in which such party shall exercise his lawful authority over such child, or direct that he shall thereafter surrender its custody to another person.[8] In this respect the award of custody in *habeas corpus* differs from the award of an equity court in a divorce proceeding; in the latter instance the court may formulate the decree so as to guard the best interest of the child and of the parties concerned.

A parent is given the right to appoint some suitable person as guardian of his child,[9] and such guardian must appear before the court and declare his acceptance in writing.[10] When a guardian has not been appointed by the parent, or if appointed has not qualified, the chancery court may appoint a guardian, giving preference in all cases to the natural guardian, or next of kin, unless such applicant be manifestly unsuitable for discharge of the duties of guardianship.[11] Upon obtaining letters of guardianship of a minor, the guardian is entitled by operation of law to the custody of the child, unless the minor has a parent living, in which case guardianship of the estate is distinct from guardianship of the person.[12] When guardianship of a minor having a parent living is granted to another person, the question of whether the parent is a suitable person to have the custody should generally be determined only when brought into controversy as the sole matter for adjudication.[13] Moreover, when the custody of a minor is determined by chancery, the decree cannot be overruled by *habeas corpus* proceedings.

The Juvenile Court Act of 1940 set up a juvenile department in the county, circuit, and chancery courts, giving them original jurisdiction over proceedings concerning dependent, neglected and delinquent children.[15] Upon a proper showing that a child is delinquent, the court may require that the person having custody do or refrain from doing any act which the judge or chancellor may deem reasonable and necessary for the welfare of the child.[16] The judge or chancellor has the power to give custody of the child to the Industrial Training School for an indefinite period of time, if he or she is delinquent, immoral, or incorrigible, and also has the power to send the child to any other institution willing to receive him if destitute

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[7]Herndon v. Bonner, 97 Miss. 328, 52 So. 513 (1910).
[8]Yarbrough v. Dunnam, 130 Miss. 669, 94 So. 892 (1932); Gray v. Gray, 121 Miss. 541, 83 So. 726 (1920).
[9]Miss. Code Ann. (1930) § 1866.
[10]*Id.* § 1867.
[11]*Id.* § 1868.
[12]*Id.* § 1865; McDowell v. Bonner, 62 Miss. 278 (1884).
[13]McDowell v. Bonner, 62 Miss. 278 (1884).
[14]Herndon v. Bonner, 97 Miss. 328, 52 So. 513 (1910).
[15]Miss. Laws 1940, c. 300, § 19.
[16]Miss. Code Ann. (1930) § 7255; Miss. Laws 1940, c. 300, § 6.

and abandoned.[17] Such a commitment has been held to be a civil and not criminal proceeding; so trial by jury is not required.[18]

It was further enacted in 1940 that the juvenile courts might order a child who is charged with the commission of a misdemeanor to be prosecuted under the criminal laws, but no child under fourteen years of age may be proceeded against criminally.[19]

In order that a court may enforce its decree and deliver custody of the child to the person entitled, it is necessary that the courts have jurisdiction of its person. Not being *sui juris,* a child can have no separate domicile of its own; and in the absence of a decree to the contrary, the domicile is that of its father. In a contest between the father and the mother for the custody of the child, it has been held a sufficient showing of jurisdiction that one parent and the child are within the jurisdiction of the court.[20] Likewise, where the defendant parent and child were residing in Mississippi, it has been held that a foreign decree (with mere publication of notice) awarding custody is of no effect.[21]

Territorial jurisdiction may be conferred by appearance or consent of the parties, but jurisdiction of the subject matter must exist in fact, and the suit must be brought in the court having territorial jurisdiction of the controversy. For example, no court may appoint the guardian of a minor except the chancery court of the county wherein the minor resides.[22]

In Mississippi in a divorce action the bill must be filed in the county wherein the complainant resides if the defendant is a non-resident of the state, while if the defendant is a resident of Mississippi the bill must be filed in the county in which such defendant resides or may be found.[23] In a *habeas corpus* proceeding the application for the writ shall be made to the judge or chancellor of the district in which the relator is imprisoned.[24] And in all cases due process requires a hearing before a court after proper notice to the parents.[25]

II. *Considerations in Determining Award of Custody*

A. Rights of Parents

Under early common law, the father was entitled to custody of the children as against the mother, and the cases were few and exceptional in which their custody would be given to her, although she lived apart from

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[17]Miss. Code Ann. (1930) § 7254; Miss. Laws 1940, c. 300, § 7.
[18]Bryant v. Brown, 151 Miss. 389, 118 So. 184 (1928).
[19]Miss. Laws 1940, c. 300, § 19.
[20]Haynie v. Hudgins, 122 Miss. 838, 85 So. 99 (1920).
[21]Steele v. Steele, 152 Miss. 365, 118 So. 721 (1928).
[22]Dukes v. State, 57 Miss. 229 (1879).
[23]Miss. Code Ann. (1930) § 1417.
[24]*Id.* § 1918.
[25]Sinquefield v. Valentine, 159 Miss. 144, 132 So. 81 (1931); Holden v. Smith, 135 Miss. 322, 100 So. 27 (1924).

her husband on account of his misconduct.[26] In Mississippi it was decided in 1860 that the common law right of the father to the custody of his legally begotten child as against its mother, in a contest between them after divorce, had been abrogated by statute;[27] the court granting the divorce had the power in its discretion to make all orders touching the custody and maintenance of children.[28] Until 1922, however, the courts still recognized the prior right of the father over the mother where there was no divorce;[29] in that year the legislature provided that the mother and father shall have equal rights and powers and that neither parent shall have a paramount right to custody of the minor.[30]

In deciding who shall have custody of the child as between parents and a third party, the natural and legal rights of the parents will be sustained unless some good reason to the contrary appears. The presumption is that the child will be better cared for by his own parents than by strangers, and it is incumbent upon the stranger to show the contrary if he wishes to gain the custody of the child.[31]

For example, *habeas corpus* proceedings were brought by the father in *Hibette v. Baines*[32] to recover the custody of two children who had lived with their grandmother for a number of years. In awarding the father custody the court said:

> "Undoubtedly, the father has primarily, by law as by nature, the right to the custody of his children. This right is not given him solely for his own gratification, but because nature and the law ratifying nature assume that the author of their being feels for them a tenderness which will secure their happiness more certainly than any other tie on earth. . . . And, as a consequence of this, it is presumed to be for the real interest of the child that it should be in the custody of its father, as against collateral relatives, and he, therefore, who seeks to withhold the custody against the natural and legal presumption, has the burden of showing clearly that the father is an unsuitable person to have the custody of his child; or that, however moral a man he may be, he had abandoned his child, contributing nothing to his support, taking no interest in it, and permitting it to remain continuously in the custody of others, substituting such other in his own place so that they stand *in loco parentis* to the child, and continuing this condition of affairs for so long a time that the affections of the child and of the foster parents have become mutually engaged to the extent that

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[26] 2 SCHOULER, DOMESTIC RELATIONS (6th ed. 1921) § 1889.
[27] MISS. CODE ANN. (1930) § 1421.
[28] Coke v. Hannum, 39 Miss. 423 (1860).
[29] Miles v. Miles, 111 Miss. 110, 71 So. 295 (1916).
[30] MISS. CODE ANN. (1930) §§ 1863, 1864.
[31] Bullard v. Welch, 171 Miss. 833, 158 So. 791 (1935); Hibette v. Baines, 78 Miss. 695, 29 So. 80 (1900).
[32] 78 Miss. 695, 29 So. 80 (1900).

a severance of this relationship would surely result in destroying the best interest of the child."[33]

It has been held also that the mother has a right to custody as against the grandmother[34] and as against the paternal grandfather[35] in the absence of a showing of abandonment or immoral conduct. In *Moore v. Christian*[36] custody of a son was given to his widowed mother, though she was very poor and ignorant, rather than to a kind man of good character and means in whose charge the father had placed the boy.

B. Prevailing Party in Divorce Action

As a usual rule the custody of the child is awarded to the party who prevails in a suit for divorce. The right of the father to the custody of his child proceeds upon the premise that he has performed his duties toward his wife and child and has done nothing to forfeit his rights.[37] In *Cocke v. Hannum*[38] the mother was granted a divorce from her husband, and the father sought custody of the child as a legal right. The court expressed its opinion in this manner:

"The father should not be permitted, when his own violation of duty produced a dissolution of the marriage tie, to deprive the mother of her child to which she is entitled by fidelity to the marriage vow."[39]

The father was granted custody in *Duncan v. Duncan.*[40] There the court said that where the husband obtains a divorce on the ground of adultery, the hardships, if possible, should bear lightest upon the unoffending husband. Similarly in another case[41] where the father was decreed a divorce on the ground of adultery of the mother, the court held it was error for her to be granted permanent custody of the child:

"In such cases the leading consideration is the welfare of the child, and the court has the power to look to the interest of the child in awarding the custody; but where the father is blameless in his life, better able, and perfectly willing, to support the child, it should not be permanently taken from him, under the evidence developed in this record."[42]

C. Welfare of the Child and Interest of the State

In listing eight noteworthy trends in the common law which are in

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[33]*Id.* at 703, 29 So. at 81.
[34]Kinnaird v. Lowry, 102 Miss. 557, 59 So. 843 (1912).
[35]Stegall v. Stegall, 151 Miss. 755, 119 So. 902 (1929).
[36]56 Miss. 409, 31 Am. Rep. 376 (1879).
[37]Johns v. Johns, 57 Miss. 530 (1879); Coke v. Hannum, 39 Miss. 423 (1860).
[38]39 Miss. 423 (1860).
[39]*Id.* at 439.
[40]119 Miss. 271, 80 So. 697 (1919).
[41]Hullett v. Hullett, 152 Miss. 476, 119 So. 581 (1929).
[42]*Id.* at 510, 119 So. at 591.

the spirit of contemporary ethics and philosophy, Dean Roscoe Pound has said:

> "Recent legislation and judicial decisions have changed the old attitude of the law with respect to dependent members of the household. Courts no longer make the natural rights of parents with respect to children the chief basis of their decisions. The individual interest of parents which used to be the one thing regarded has come to be almost the last thing regarded as compared with the interest of the child and the interest of society. In other words, here also social interests are now chiefly regarded."[43]

Thus the paramount consideration in awarding custody of children is and should be their welfare.[44] The relationship between the parent and the child exists not for the benefit of the parent, but for the interest of the child. If opposed to the welfare of the child, the rights and desires of the parents must yield to the former.[45] The courts must disregard the passions, prejudices and desires of the moment, and determine what will most surely conduce in every way, physically, mentally, and morally, to the child's general welfare, so that when he reaches maturity he will be fitted to discharge the duties of citizenship.[46]

To insure adequate protection and training of juveniles the state has enacted the Juvenile Court Act of 1940,[47] amending the prior juvenile legislation.[48] Such juvenile legislation is not objectionable on the ground that it deprives parents of the custody of their children.[49] In *Bryant v. Brown*[50] the child many times had been guilty of misdemeanors, and had been committed to the Industrial Training School. The court, in holding such commitment not a violation of the personal rights and liberties of the children and of their parents under the Fourteenth Amendment, said that as long as parents properly exercise their duty to rear, educate, and control their children, their right to do so may not be interfered with solely because some other person or some other institution might be better suited for that purpose. But where they fail so to rear and educate the child as to make it a useful, intelligent, and moral being, and permit it to go unrestrained and to become vicious in its habits and practices and menacing to the rest of society, they have forfeited their primary right to control their offspring.[51]

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[43]Pound, The Spirit of the Common Law (1921) 189.

[44]Hayes v. Morgan, 164 So. 880 (Miss. 1936); Hullett v. Hullett, 152 Miss. 476, 119 So. 581 (1929); Duncan v. Duncan, 119 Miss. 271, 80 So. 697 (1919); Glidewell v. Morris, 87 Miss. 82, 43 So. 537 (1906); Maples v. Maples, 49 Miss. 393 (1873).

[45]Morgan v. Shelly, 111 Miss. 868, 73 So. 700 (1916); McShan v. McShan, 56 Miss. 413 (1879); Maples v. Maples, 49 Miss. 393 (1873).

[46]Amis, Divorce and Separation in Mississippi (1935) 212.

[47]Miss. Laws 1940, c. 300.

[48]Miss. Code Ann. (1930) §§ 7254, 7255.

[49]Bryant v. Brown, 151 Miss. 389, 118 So. 184 (1928).

[50]151 Miss. 389, 118 So. 184 (1928).

[51]*Id.* at 415, 118 So. at 188.

D. Suitability of Parents

An important consideration in determining custody of the child is the suitability of the persons to whom custody is awarded. In choosing the more suitable parent, the character, moral stability, health, temperament, ability or capacity of the parent, and the parent's interest in the child's welfare are important.

If the mother is immoral her character obviously offers no guaranty of the proper care and training of her son.[52] Conversely, where the father is a drunkard, living in an immoral environment, and deserts the child, the father is an unsuitable person to be given custody.[53] In *Hayes v. Morgan*[54] the father brought *habeas corpus* proceedings to obtain custody of his children from their maternal grandparents. The court said:

> "The testimony bearing upon the habits and conduct of appellant was to some extent conflicting, but it would abundantly support the finding by the chancellor that he was addicted to drunkenness, and was wholly without means on account of such drunkenness. This being true, having in view the best interest of the children, we are unable to say that the chancellor erred in refusing to disturb the existing condition by awarding the custody of these children to the appellant. When his immoral habits and conduct are corrected, he will be entitled to the custody of his children."[55]

However, it has been held that the fact that the father drank whiskey and played poker to a limited extent did not alone make him an unsuitable person to be intrusted with the custody of his child.[56] Likewise a mere showing that the reputation of the mother for chastity and virtue was bad has been held insufficient to merit the award of custody of the child to its grandfather.[57]

F. Age, Health, and Sex of the Child

It has been customary for courts to award custody of infants and younger children to the mother, rather than the father, especially if the child is of delicate health; daughters will more naturally be awarded to the mother.[58] But this rule does not apply against the father for the benefit of any person other than the mother.[59]

The court awarded custody of a child of three to the mother in *Coke v. Hannum;*[60] it pointed out that the child was so young that a mother's

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[52]Maples v. Maples, 49 Miss. 393 (1873).
[53]Morgan v. Shelly, 111 Miss. 868, 73 So. 700 (1916).
[54]164 So. 880 (Miss. 1936).
[55]*Ibid.*
[56]Duncan v. Duncan, 119 Miss. 271, 80 So. 697 (1919).
[57]Stegall v. Stegall, 151 Miss. 875, 119 So. 80 (1929).
[58]2 SCHOULER, *op. cit. supra* note 26, § 1893; 27 C. J. S. Divorce § 309.
[59]Glidewell v. Morris, 89 Miss. 82, 42 So. 537 (1906).
[60]39 Miss. 423 (1860).

care and attention were necessary. In a similar case[61] the father brought *habeas corpus* to recover the custody of his two daughters. He had three years previously deserted the mother and children. The court refused to place them with him, saying that he had no person with him competent to minister to young girls.

In *Johns v. Johns*,[62] where the mother received custody of the children in a divorce decree, it was said:

> "The fruits of this unfortunate marriage are two children: one about four years old, and the other about two years of age. They should be with their mother. They need her care and attention. They would have been with her but for the breach of his marital duties by their father, which drove the mother from her home."[63]

In *O'Neal v. O'Neal*[64] the mother instituted *habeas corpus* proceedings against her divorced husband for possession of their infant daughter who was at that time eighteen months old. The chancellor awarded temporary custody to the petitioner, and the father appealed. The court pointed out that neither litigant could be said to have demonstrated his preeminently superior fitness as a parent, but affirmed the lower court's decision intrusting the child to the mother for a probationary period of six months and reserving the right at the end of that time to change custody if the mother failed in her parental duty, saying:

> "True, the father is financially better qualified to give the child the comforts, if not the luxuries of life, but balanced against this consideration is the powerful influence of a mother's love and tenderness. The child is but two years old, and we think that at such an age the interest of the infant will not suffer in the arms of a mother though she eats only the bread of comparative poverty."[65]

Thus, the foregoing cases[66] tend to show that where there is no unsuitability shown on the part of the mother, and the child is of an age, sex or health which requires the attentions of a mother, the courts will award her custody notwithstanding the fact that she is not the innocent party in the suit.

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[61] McShan v. McShan, 56 Miss. 413 (1879).

[62] 57 Miss. 530 (1879).

[63] *Id.* at 532.

[64] 95 Miss. 415, 48 So. 623 (1909).

[65] *Id.* at 420, 48 So. at 624.

[66] See also Miles v. Miles, 111 Miss. 110, 71 So. 295 (1916), where *habeas corpus* proceedings were brought by father to recover custody of child of eleven months from mother who had separated from husband. There was no unfitness shown on part of mother, and the court gave her custody, saying that it did not believe that the father (situated as he was) could give the infant that care and attention which his tender age demanded.

But the husband was awarded custody of his boy of seven in Duncan v. Duncan, 119 Miss. 271, 80 So. 697 (1919).

F. Wealth of Parents, Residence

The parents' financial condition[67] is pertinent, but the mere fact that the financial status of one is better than that of the other is not alone sufficient to justify an award of custody.[68] *A fortiori,* the financial worth of persons other than the parents is important only when it appears that the parents themselves are unable to provide the necessities of life.[69] The mere fact that another party has power to give better social and educational advantages does not warrant depriving the parent of his child.[70]

The mother sought to recover the child's custody from his grandfather in *Maples v. Maples.* She was shown to be immoral, the court said, with no ostensible business other than that of a cook. Her employment, as well as her character, offered no guaranty of the proper care and training of her son. Considering the child's welfare, the court denied the petition.

In *Duncan v. Duncan*[71] the husband who had obtained a divorce on ground of adultery brought *habeas corpus* proceedings against his ex-wife for custody of their child. Since the father was of good character, and financially able to care for the child, and since the mother was not, the court awarded him custody. The mother had no means of supporting the child, other than her small interest in the estate of her grandmother, and she was largely dependent upon the charity of her father. So the child had to be supported by petitioner, or else it would have suffered.[72]

G. Preference of the Child

Where the mother or father is unsuitable for discharging the duties of guardianship, the court or chancellor may appoint some suitable person.[73] A child over fourteen is given the power to select such guardian, but, if he selects any person other than his natural guardian or next of kin, the court has power to appoint the natural guardian, if the latter is deemed more suitable.[74] Where it considers the child of adequate discretion, the court may consider his wishes in awarding custody. But it is properly hesitant to deliver custody of a child to a person other than its parent, in the absence of such conduct on the part of the parent which would completely forfeit the latter's right to the child.

Forbes v. Warren[75] concerned the custody of a child of more than fourteen years of age who was opposed strongly to leaving her maternal grandparents; they had raised her since her mother's death in childbirth. There was evidence to show that the change might jeopardize the health of

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[67]Turner v. Turner, 93 Miss. 167, 46 So. 413 (1908).
[68]O'Neal v. O'Neal, 95 Miss. 415, 48 So. 623 (1909).
[69]27 C. J. S. Divorce § 309.
[70]Nickle v. Burnett, 122 Miss. 875, 119 So. 802 (1920).
[71]119 Miss. 271, 80 So. 697 (1919).
[72]*Id.* at 281, 80 So. at 701.
[73]Miss. Code Ann. (1930) § 1863.
[74]*Id.* § 1868.
[75]184 Miss. 526, 186 So. 325 (1930).

the child. Accordingly, the court said that the wishes of children of sufficient capacity to choose for themselves should be given especial consideration when their parents have for a long time voluntarily allowed them to live in the family of another. No coercive order should be made in such cases to enforce the mere legal right of the parent to their custody, against the manifest inclination and reasonable choice of the children to remain where they are.

On the other hand, in *Moore v. Christian*,[76] the mother of a boy of thirteen brought *habeas corpus* for her son who had been placed in the charge of a stranger by the boy's father before his death. The child stated that the third party treated him well and promised to give him a horse, saddle, and bridle if he would remain. But the court said that although in doubtful cases the wishes of a child will be sought, it could not agree that "a boy of thirteen can be allowed to abandon his filial duties and select elsewhere a home more agreeable to his worldly interest."[77] Similarly, in *Hibette v. Baines*[78] the father brought *habeas corpus* to obtain custody of his children (of ten and thirteen years) as against their aunts. The court rationalized its holding for petitioner as follows:

> "The child speaking out its choice of a custodian at ten or thirteen selects with reference alone to the continued furnishings of those things which make up happiness and joy for those ages. . . . The vision of the little ones of ten and thirteen sees nothing beyond the horizon bounding those years. They cannot balance the advantages and disadvantages of different custodians, so as to correctly determine which one will guide them best, and fashion them most wisely into the makeup of perfect manhood and womanhood."[79]

H. Abandonment

Where it can be shown that the parent deserts his infant child under such circumstances as to show an intent to shirk or evade the duty, trouble, or expense of rearing it, or callous indifference to its wants, or a reckless disregard of its welfare, he is guilty of such an abandonment as to bar his right to reclaim thereafter its custody from any person who may have protected it during the period of desertion.[80] This rule, primarily for the protection of the child, is best stated in *McAdams v. McFerron*:[81]

> "Having once deserted the child there is no guaranty that such a parent might not in the future be guilty of some other

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[76]56 Miss. 408, 31 Am. Rep. 375 (1879).

[77]*Id.* at 411, 31 Am. Rep. at 376.

[78]78 Miss. 695, 29 So. 80 (1900); *accord*, Kinnaird v. Lowry, 102 Miss. 557, 59 So. 843 (1912). Here the court awarded custody to the mother even though her children expressed a wish to remain with their grandmother. The preference was only one of the facts and by no means a controlling one.

[79]*Id.* at 720, 29 So. at 87.

[80]AMIS, *op. cit. supra* note 46, § 216.

[81]180 Miss. 644, 178 So. 333 (1938).

> equally atrocious conduct toward it. But if a parent, out of regard for the feelings or affections of kindred, or for purposes of education or training, or for any other just and reasonable cause, permits or allows a child to remain in the custody of another person, under such circumstances as to show that he or she did not intend to sever the relation of parent and child, or to shirk or evade the duty of rearing and maintaining it, and was not callous or indifferent as to its welfare, then such conduct does not bar his or her right to reclaim custody, even though during such time the affections of the child and the custodian for each other may have grown to be very great."[82]

In an 1879 case[83] the father had deserted his mother and child, leaving them destitute; shortly afterwards another child was born. The mother returned with her children to her father's home, where she was well cared for. For the next three years the father contributed nothing to the support of the wife or children, although he was able to do so. He then sought a reconciliation with his wife but was refused. His petition for *habeas corpus* was also denied. The wife had found for herself and children a home in her father's family, which was assured as long as he lived, and he, the father, promised to provide for them after his death. The court thought that it "would be a grave responsibility to disturb that happy condition. . . ."[84]

The father also had abandoned his child in *Morgan v. Shelly*.[85] For about twelve years the mother cared for this child, the father contributing nothing to his support. He was denied custody.

The one asserting the abandonment of course has the burden of proving it by clear and convincing evidence.[86] In *Nickle v. Burnett*[87] this burden was not met. Upon the death of the child's mother, the father had left the child with its aunt until the father remarried. Later the aunt brought *habeas corpus*, which was denied. His leaving the child in the custody of the aunt was prompted by feelings of consideration for the child, and not by any lack of affection. The mere fact that others may have had for a time custody of the child, and may have supported it, did not show an abandonment by the parent, and did not warrant denying custody to him.

I. Relinquishment of Right to Custody.

If a parent agrees with a third party to give such party custody of a

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[82] *Id.* at 655, 178 So. at 336.
[83] McShan v. McShan, 56 Miss. 413 (1879).
[84] *Id.* at 418.
[85] 111 Miss. 868, 73 So. 700 (1916).
[86] Bullard v. Welch, 171 Miss. 833, 158 So. 791 (1935); Hibette v. Baines, 78 Miss. 695, 29 So. 80 (1900).
[87] 122 Miss. 875, 119 So. 802 (1920).

child, the contract is void as against public policy.[88] Such a relinquishment is not, of itself, effective to deprive the parent of the right to the child's custody; a child is not property.[89] *Fullilove v. Banks*[90] is perhaps a factual exception to that rule. There the mother had given the child of three to its paternal grandmother, who accepted the care upon the mother's promise never to take the child from her. At that time the mother was a prostitute, but claimed subsequently to have reformed. Yet she was denied custody. Her earlier promise not to repossess the child was a "factor" in the result.[91]

Upon a showing of circumstances amounting to abandonment in addition to a contract giving custody of the child to another, it is held that the parent has forfeited his right to his child.[92]

Yet if the agreement is between the parents, it may be binding upon the parties to it and regulate their rights and obligations *inter sese*. However, where the welfare of the child is involved in litigation, as it is in divorce cases, parents cannot by contract preclude the court from an inquiry as to which parent should have custody.[93]

III. *Support*

A. Duty to Support

In England and in a few American states, a parent's duty to support minor children has been regarded merely as a moral obligation. Such courts have said that, in the absence of an express promise, a third person must show the existence of circumstances other than the mere blood relationship of the parties in order to imply a promise to pay for support.[94] However, the weight of authority in this country is to the contrary; a third person may recover from a father for necessaries furnished to a minor child, on either an implied contract or agency theory.

In Mississippi the father and mother are jointly charged by statute with the care, nurture, welfare, and education of their minor children.[95] Upon the death of the father, who is primarily liable, the legal duty to support and care for the child is upon the mother.[96] It is made a felony, by Section 861 of the Mississippi Code of 1930 for a parent to desert or wilfully neglect his child of under sixteen.

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[88]Bullard v. Welch, 141 Miss. 833, 158 So. 791 (1935); Hibette v. Baines, 78 Miss. 695, 29 So. 80 (1900); Moore v. Christian, 56 Miss. 408, 31 Am. Rep. 408 (1879).

[89]Madden, Persons and Domestic Relations (1931) §§ 107-109.

[90]62 Miss. 11 (1884).

[91]*Id.* at 13.

[92]McAdams v. McFerron, 180 Miss. 644, 178 So. 333 (1938); Morgan v. Shelly, 111 Miss. 868, 75 So. 700 (1916).

[93]27 C. J. S. Divorce § 311.

[94]20 R. C. L. Parent and Child § 30; Madden, *op. cit. supra* note 89, § 110; 46 C. J. Parent and Child § 42.

[95]Miss. Code Ann. (1930) § 1863.

[96]Watts v. Smylie, 116 Miss. 120, 16 So. 684 (1917); Boyett v. Boyett, 112 Miss. 201, 119 So. 299 (1928).

This duty to support exists where the mother leaves home with adequate cause, or where she is forced to leave. In *East v. King*[97] the mother of the wife sued the husband for board and lodging of the wife and three children; he had ordered her to leave their home. The court said that a husband is under a duty to support his wife, and, if he leaves her without the means of sustenance, she becomes an agent to supply upon his credit her and her children's necessities. Moreover, where the wife leaves her husband without adequate cause, taking their child with her,[98] the father is liable for his child's necessaries.[99]

In addition, a divorce decree, which awards custody of the child to its mother, does not release the father from liability for necessaries of the child.[100] For example, in *Lee v. Lee*[101] the mother sued out a writ of sequestration to recover the allowance of support, for a child whose custody had been awarded to the mother, and although the father was deprived of the custody, society and services of his child, there remained his common law liability to support "unless there is some reason shown the court why he should be relieved from that obligation."

A decree which relieves a father from this liability to support his child is void as against public policy.[102] In one instance[103] the court granting the divorce provided that payment of $200 by the father should be in full settlement of alimony and support for a nine months old child. Three years later the wife could not earn a living, and the child needed medical care. The Supreme Court directed the father to pay $21 per month for the child's support, saying that the former's duty to support his child is absolute and that the trial court was without power to relieve the appellant from this duty.

In the absence of a contract to the contrary, the duty of a parent to support the child ceases when the latter reaches the age of majority.[104]

B. Enforcement of Duty

Funds for support of the child of course may be provided for in the divorce or separate maintenance decree. The court decreeing the divorce is given by statute[105] the power to make all orders touching the maintenance of the children of the marriage; but such allowance must be prayed for specifically.[106] Suppose that in a *habeas corpus* proceeding the court

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[97]77 Miss. 738, 27 So. 608 (1900).
[98]Russell v. Russell, 170 Miss. 364, 154 So. 881 (1934).
[99]Boyett v. Boyett, 152 Miss. 201, 119 So. 299 (1928).
[100]Walters v. Walters, 180 Miss. 286, 177 So. 507 (1937); Lee v. Lee, 135 Miss. 865, 101 So. 345 (1924).
[101]135 Miss. 865, 101 So. 345 (1924).
[102]46 C. J. Parent and Child § 36.
[103]Walters v. Walters, 180 Miss. 286, 177 So. 507 (1937).
[104]Wright v. Coleman, 137 Miss. 699, 102 So. 774 (1925).
[105]Miss. Code Ann. (1930) § 1421.
[106]Schneider v. Schneider, 155 Miss. 621, 125 So. 91 (1929).

made no provision for the child's support. May it subsequently consider this matter? In *Gray v. Gray*[107] the answer was negative:

> "The judge does not merely, because he presided in a *habeas corpus* trial in which the right to custody of a person was determined, thereby acquire perpetual jurisdiction over the custody of such person. When the order entered by him either freeing the person from restraint or awarding his custody to the party entitled thereto has been executed, the judge's jurisdiction in the matter is at an end unless and until it is again invoked by issuance of another writ of *habeas corpus*."

But on the other hand, when there is no provision for support of children in the divorce decree, the mother may bring a separate suit to recover the necessary expenditures and for future support.[108] And this is so even though the court rendering the decree did not have jurisdiction.[109] The father's common law liability entitled the mother to recover whatever sums might have been necessarily expended by her for support of their child.

If it can be shown that a parent intentionally neglected or deserted his or her child, leaving it in destitute circumstances, such parent is guilty of a felony.[110] But of course the state must show willful neglect or refusal to support.[111]

Regardless of the existence of this obligation, equity will not entertain a bill by the child against the father to determine in advance the amount of support. Thus in *Rawlings v. Rawlings*[112] a bill was brought by six minor children against their father (by next friend) to have the chancellor fix in advance a monthly allowance for them, enter a decree requiring defendant to pay the sum fixed, and adjudge a lien upon defendant's real estate for the sums so ordered. The mother was unable to care for the infants, and the father had not lived with them or their mother for a number of years, nor had he contributed to their support. Nevertheless, the court said that the moral obligation of a parent to support his child is not directly enforceable; a court of equity cannot compel the performance of this duty. It may be enforced under statute, or indirectly where a stranger supplies the infant with necessaries, but by no provision of the law is the child given an interest in the estate of the father, such as the wife has in the homestead or other lands of her husband.

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[107]121 Miss. 541, 83 So. 726 (1920).

[108]Russell v. Russell, 170 Miss. 364, 154 So. 881 (1934); Schneider v. Schneider, 155 Miss. 621, 125 So. 91 (1929).

[109]135 Miss. 865, 101 So. 345 (1924).

[110]Miss. Code Ann. (1930) § 861.

[111]Ladner v. State, 165 Miss. 140, 146 So. 216 (1931); Page v. State, 160 Miss. 300, 133 So. 216 (1931).

[112]121 Miss. 140, 83 So. 146 (1919).

Assuming jurisdiction is acquired, failure of the parent to comply with the decree places him *prima facie* in contempt of court and devolves upon him the burden of proving his inability to make the payments directed. Upon failure to meet this burden he is punishable by fine and imprisonment.[113]

In determining the father's present ability to pay, the amount of his past earnings and the manner in which they have been expended are not necessarily controlling.[114] He has a right to deduct his necessary living expenses, but he must live economically; money not required for these expenses is subject to the decree.[115]

A decree for alimony (including money for support of children) by a foreign court may be enforced by courts of chancery in Mississippi; they may assume jurisdiction of the alimony decree and enforce it.[116] But if the foreign decree is one that may be annulled, varied, or modified by the court rendering it, it is not enforceable under the full faith and credit clause of the United States Constitution.

C. Amount of Allowance

The actual amount of allowance the child should receive in a divorce or separate maintenance decree is necessarily left to the discretion of the court, but as a general rule it is determined by taking into consideration the health, financial resources, and station in life of the child and its parents.[117]

The average expenses of support are the governing criteria; a separate suit may be brought to recover expenses arising from unforeseen contingencies.[118] In *Russell v. Russell*[119] the mother moved for alimony and support pending an appeal in her divorce proceeding. She was allowed $65 a month. In the interim the child became critically ill, and was removed to a hospital. Bills accumulated to the amount of $433.85; the mother paid them and sought remuneration from the father. Because the court had not been able to anticipate the near fatal illness of the child and because the original allowance was not *res judicata,* the mother was permitted to maintain an action for these unforeseen expenses in a court of law.

By statute[120] the court granting the divorce is given the power to change the decree and to make new provisions concerning maintenance of the children, as circumstances may require. Hence upon a showing that conditions have changed and the needs of the children have become greater,

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[113]Ramsay v. Ramsay, 125 Miss. 185, 87 So. 491 (1921).
[114]Collins v. Collins, 171 Miss. 891, 158 So. 914 (1935).
[115]Ramsay v. Ramsay, 125 Miss. 185, 87 So. 419 (1921); Fanchier v. Gammill, 148 Miss. 723, 114 So. 873 (1927).
[116]Gallant v. Gallant, 154 Miss. 832, 123 So. 883 (1929).
[117]46 C. J. Parent and Child § 34.
[118]Turnage v. Tyler, 183 Miss. 318, 184 So. 57 (1938).
[119]170 Miss. 364, 154 So. 881 (1934).
[120]Miss. Code Ann. (1930) § 1421.

the court may increase the allowance to a sum commensurate with present needs.[121] In *Walters v. Walters*[122] the mother and father were granted a divorce; the decree provided that payment of $200 should be in full settlement of alimony and support for the child. Three years later the mother could not earn a living and the child needed medical care. It was held proper for the court to order the husband, who was remarried and who had another child, to pay an additional $12 per month for the support of his first child.

The court further may impose upon the father the obligation to pay expenses incident to presentation of the petition for the infant's support, including attorney's fees, where the divorced mother was financially incapacitated.[123]

A necessary consequence of the duty to support a minor is that the parent must provide it with a proper education.[124] What is a proper education depends upon the circumstances of the particular case. Neither the station of the child and his parents in society nor the decision of his father is conclusive.[125] In Mississippi it is provided by statute that every parent or person having control of a child between the ages of seven and sixteen years shall be required to send it to a public day-school or to a private denominational or parochial day-school. Therefore it would seem that expenses for such schooling are necessaries for which a parent is liable. They must be considered in determining the allowance for support. But they do not include tuition or board at private parochial schools, or the expense of a college education.[128]

Dolsie Williams.

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[121]Turnage v. Tyler, 183 Miss. 318, 184 So. 52 (1938).
[122]180 Miss. 268, 117 So. 507 (1937).
[123]*Ibid.*
[124]Sides v. Pittman, 167 Miss. 651, 150 So. 211 (1933); Schneider v. Schneider, 155 Miss. 621, 125 So. 91 (1929).
[125]Miss. Code Ann. (1930) § 1863.
[126]46 C. J. Parent and Child § 44.
[127]Miss. Code Ann. (1930) § 1716.
[128]Garrett v. Colvin, 77 Miss. 408, 26 So. 963 (1899).

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Of Mississippi Law Journal published 5 times a year at University, Mississippi, for 1944-1945. State of Mississippi, County of Lafayette, ss.

Before me, a Notary Public in and for the State and county aforesaid, personally appeared Huey B. Howerton, Jr., who, having been duly sworn according to law, deposes and says that he is the editor of the Mississippi Law Journal and that the following is, to the best of his knowledge and belief, a true statement of the ownership, management, (and if a daily paper, the circulation), etc., of the aforesaid publication for the date shown in the above caption, required by the Act of August 24, 1912, as amended by the Act of March 3, 1933, embodied in section 537, Postal Laws and Regulations, printed on the reverse of this form, to wit:

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